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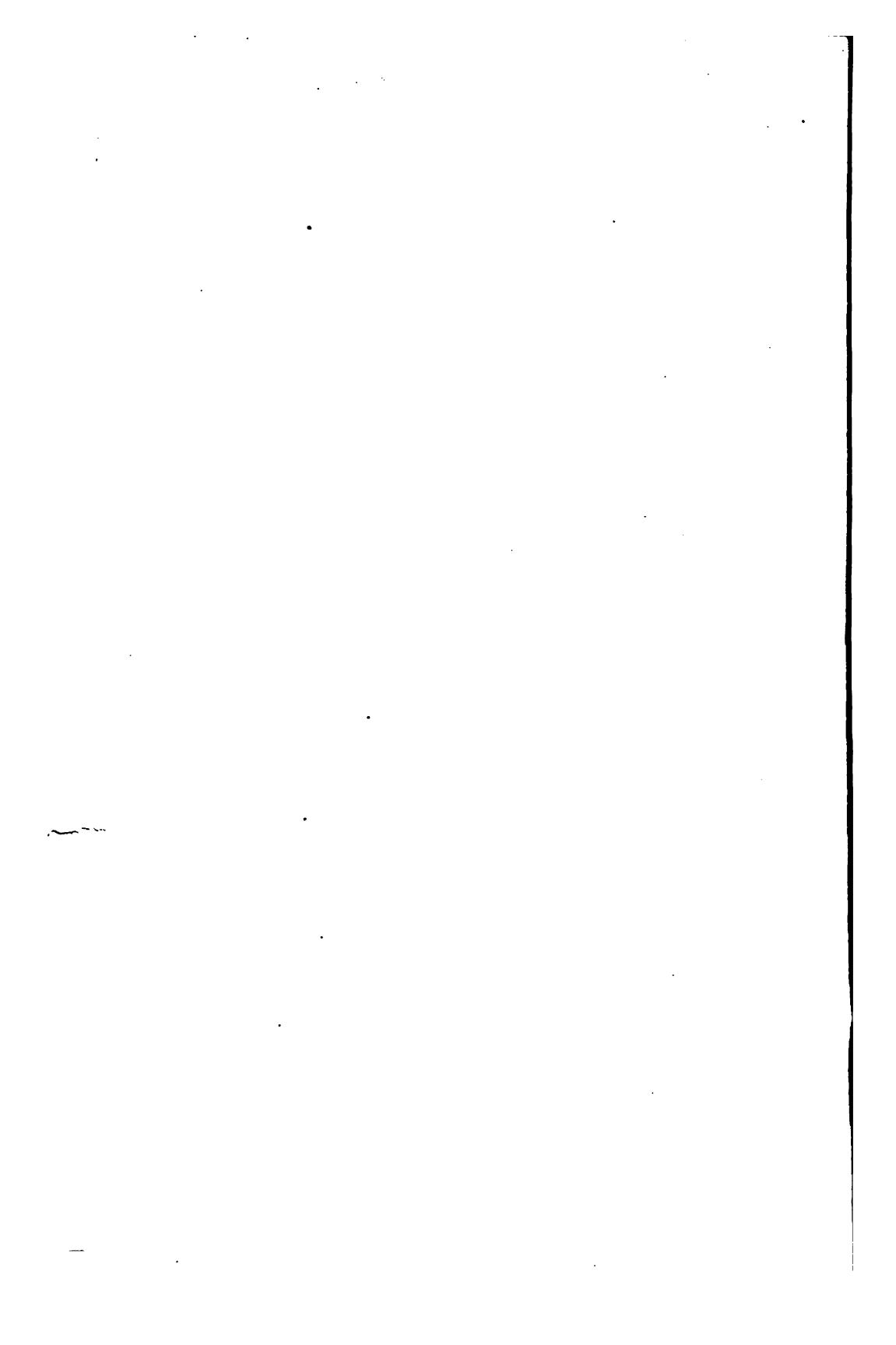


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HAWAIIAN REPORTS *c f*
VOLUME 16.

CASES DECIDED

IN THE

[Supreme Court] of the Territory of Hawaii

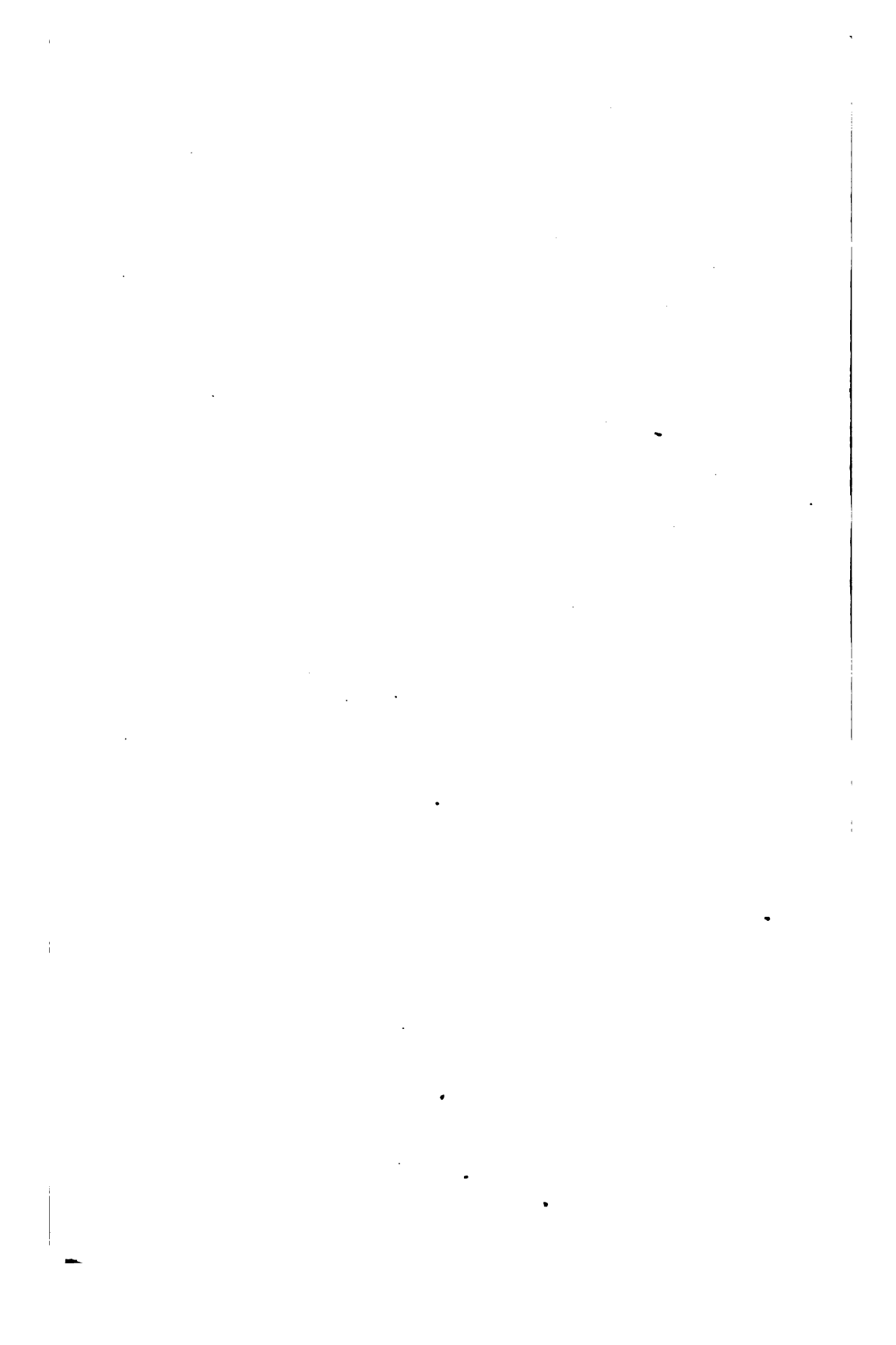
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JUSTICES
OF THE
SUPREME COURT OF HAWAII

DURING THE PERIOD OF THESE REPORTS:

CHIEF JUSTICE,

HON. WALTER FRANCIS FREAR.

ASSOCIATE JUSTICE,

HON. ALFRED S. HARTWELL.

ASSOCIATE JUSTICE,

HON FRANCIS M. HATCH,

resigned Jan. 31, 1905.

HON. ARTHUR A. WILDER.

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CASES DECIDED

BY THE

SUPREME COURT

OF THE

TERRITORY OF HAWAII.

ROBERT M. FULLER *v.* HONOLULU RAPID TRANSIT
and LAND COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 21, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

JUDICIAL NOTICE—*street railway act of public nature.*

The court takes judicial notice of Chapter 69 of the Act of 1898, authorizing a street railway in Honolulu, but if this were not so the defendant's admission that it was a corporation organized under the Act would dispense with proof of the Act.

RIGHT OF WAY—*due care required in its exercise.*

The right of way mentioned in Section 11 of the Act does not require that persons lawfully using the highway shall not pass in front of the defendant's cars under any circumstances, nor authorize

defendant's cars to cross intersecting streets at times and under circumstances endangering the lives or property of persons attempting to cross in front of the cars. The defendant corporation's duty requires it to exercise due and proper care to avoid injury to other persons.

CONTRIBUTORY NEGLIGENCE PER SE—*not in walking along stepping board of car.*

It is not contributory negligence on the part of the plaintiff to step upon the outer platform of defendant's car while stopping for passengers and to walk forward on the standing board to find room to sit in the car, it appearing that the car was full.

NEGLIGENCE—*verdict cannot be set aside if negligence reasonably inferred from evidence.*

The evidence in the case is not such as to permit of but one reasonable inference concerning the defendant's negligence; consequently a decision by the court, jury waived, in favor of the plaintiff cannot be set aside on the ground that there was no evidence on which defendant's negligence might reasonably be inferred.

PHYSICAL EXAMINATION—*must be applied for before trial, if right exists at all.*

Whether in a case like the present a defendant is entitled to obtain physical examination of the plaintiff is not required to be determined in this case, since if such right exists in any case the examination ought to be applied for before entering upon the trial.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiff averred in his declaration that while a passenger on the defendant's electric street railway car on February 22, 1902, a collision, owing to the defendant's negligence, occurred at the crossing of Nuuanu and Hotel streets in Honolulu, between the said car and a car and team of the Hawaiian Tramways Company, by reason of which collision the plaintiff, without fault or negligence on his part, was caught and crushed between the defendant's car and the tramway's car and team and received serious and dangerous injuries and was greatly bruised, hurt and wounded and so remained for a long time, and has ever since suffered great pain and injury and mental anxiety, and been unable to transact business.

Jury was waived by the parties and the cause was tried by

Robinson, J., of the First Circuit Court, who decided in favor of the plaintiff, awarding him \$2250 damages. At the close of the plaintiff's case the defendant moved for a non-suit on the ground that the driver of the tramcar was shown by the evidence to have seen defendant's car, "at the crossing and about to cross the street ahead of himself and in spite of that fact started up and attempted to cross irrespective of the law that gives to the Rapid Transit Co. the right of way," (referring to Section 11, Chap. 69, Acts of 1898), and claiming that the evidence showed "that the position of the two cars was such that the tramcar was bound to wait until the Rapid Transit car had passed". The court while inclining to the opinion that there having been no proof of the Act it was not bound to take judicial notice of it, ruled that "whether this was so or not the Act simply gave the Rapid Transit Co. a right of way in the event that two cars should endeavor to cross at the same time, so that if both started at the same time from points equally distant it would have been the duty of the driver of the tramcar to stop so as to permit the passage of the Rapid Transit car". The court, however, held that the testimony showed "that the driver of the tramcar had actually started to cross the street before the two-bell signal had been given for starting the Rapid Transit car and for that reason, as well as because there was testimony that the motorman was not looking toward the direction from which the tramcar was coming", denied the motion, the defendant excepting to the denial. The defendant's admission at the opening of the case that it was "a corporation authorized to carry out the provisions of the franchise conveyed by the Act 69 of the Laws of 1898" dispensed with proof of the Act. But apart from this admission judicial notice may be taken of the Act. As a common carrier of passengers the defendant corporation is of a *quasi* public nature; the Act under which it was incorporated "applies to and affects all persons, i. e., the public and not merely certain persons or classes of persons or interests." Section 502, Endlich, Interp. sts. We are unable, however, to accept the defendant's

view of the construction of Sec. 11 of this Act, which reads as follows:

"The cars lawfully occupying and using said railway shall be entitled to and have the right of way upon the tracks by this Act authorized to occupy streets, roads and places, as herein mentioned, except that in case of fire such right shall yield to the fire engines during the continuance of such fire in Honolulu, and to the Honolulu police authorities in case of emergency."

The right of way referred to in the above section does not require that other persons lawfully using the highway shall not pass in front of a Rapid Transit car under any circumstances; nor does the Act authorize the cars of the defendant corporation to cross intersecting streets at times and under circumstances endangering the lives or property of persons crossing or attempting to cross in front of the cars. It is the duty of the defendant corporation to exercise due and proper care to avoid causing injury to other persons. Whether a person in attempting to cross in front of an electric car used proper care, or took upon himself unnecessary risks amounting to contributory negligence, is a question not arising in passing upon this exception.

The transcript of the record shows that there was evidence on which the jury, or court sitting in place of a jury, could properly have found that the driver of the tramcar had started to cross the street before the Rapid Transit car had started, and also that the motorman was not looking in the direction from which the tramcar was coming. Mrs. Sharratt testified for the plaintiff (pp. 38, 39, transcript of evidence) that she was a passenger on the tramcar coming down Nuuanu street at the time of the accident; that the tramcar stopped toward Hotel street before it got to the crossing, when some passengers got off, that at about that time she saw an electric car of the Rapid Transit Co. "standing on the Waikiki side of Hotel street; the car was standing there before we stopped. The motorman of the Rapid Transit car was not looking; after the tramcar had already started they started and he had not seen it and by the time he saw it coming it was too close and the tramcar driver had just time to turn the mules,

and the whiffletree or pole thumped against it," (the Rapid Transit car). This witness also testified (page 44) "that three passengers on the tramcar got off from the car near Hotel street". The driver of the tramcar, Costa, a witness for the plaintiff, identified on cross-examination a written report made by him to his company, which report was produced and filed by defendant and which reads as follows: "As I was coming down Nuuanu street driving car No. 16, I saw on the left hand side of Nuuanu and Hotel street car No. 33 of the R. T. & L. Co. on the corner. The car stopped to pick up passengers so I drove my team ahead, as I was about 10 feet from the middle of the street, the motorman turned the power on and started to go ahead. I stopped about two feet away from the car and saved my mules by pulling them the right hand side of my car. The car passed me and just caught my singletree which was sticking out. At the time a man was on the steps of the car, and got tangled with the singletree and fell down." The same witness says (page 50) that he stopped the tramcar at the mauka corner of Nuuanu street and that the defendant's car was then at a standstill on the left hand side of Nuuanu street on Hotel street, that the witness started up first, that the motorman "was looking over towards the left hand side, when I started I heard the conductor give the signal two bells, and as he gave the signal of two bells the motorman was looking over the other side" (page 51). The witness says that he then saw the motorman's hand go around on the lever and the car going ahead. He adds, (page 52), "I saw that I did not have time enough to go over and I tried to stop the car and pulled up my mules to one side and this whiffletree on the tramcar stayed sticking out that way and as the electric car came along I saw somebody get tangled with the whiffletree all along and down he went." In answer to the question, "How close to the electric car did the tramcar come?" the witness after mentioning the singletrees "they have on each tramcar" answered, "half of one length, that length was beneath the car when the horses or mules switched around" (page 52). "The mules turned right nearly around the car on

the right hand side of the car, the chains were along and they switched right to one side" (page 53).

The exception to the refusal to grant the motion for a non-suit cannot be sustained.

The defendant relies mainly upon the following three points, based upon its exception to the "verdict, decision and judgment as being contrary to law, against the evidence and weight of the evidence" and upon its exception to the refusal of the court to order a physical examination of the plaintiff.

1. "That the evidence in this case does not show any negligence on the part of the defendant.

2. "If the defendant was guilty of negligence then the plaintiff was guilty of contributory negligence and cannot recover.

3. "The refusal to grant a physical examination of the plaintiff of some sort is reversible error."

The second of these points, namely, that the plaintiff was guilty of contributory negligence, will be considered first.

The evidence shows that the plaintiff about 6 o'clock p. m. on Saturday of February 22, the anniversary of Washington's birthday and a public holiday, stepped upon the outer platform or standing board of this car after it had stopped for passengers near the crossing of Hotel street and upon the upper or mauka side of the car. That while standing there he paid his fare and walked forward upon the standing board to see if he could find room to sit down in the car, that he got a little forward of the middle of the car, still on the step or standing board, when the collision occurred. That he was struck by the end of the whiffle-tree of the tramcar immediately after he had started forward. The policeman, Keopuhiwa, a witness for the defendant, testified (page 167), that the car "was full and there were some outside of the body of the car". We cannot say as a matter of law that the plaintiff was guilty of contributory negligence in getting upon the car at the side or in walking along the outside stepping board to find a seat, the car appearing to be full. The stepping board is intended to be used for that purpose and that it is so used by the public is a matter of common notoriety. In

Thane v. Traction Co., 191 Pa. St. 252, the plaintiff had taken a position on the back platform with knowledge that there were vacant seats within the car, he stood holding a metal rod which protected the back window when a collision occurred, the effect of which was to throw him forwards and then backwards, causing him to strike the iron dashboard with his back and fall into the street receiving injuries. The court held that the plaintiff's riding upon the platform was negligence *per se*, saying: "The proper and assigned place for passengers is inside the car. Unless he shows some valid reason to excuse him, a passenger is bound to put himself in the appointed place, and if he does not, he takes the risk of his location elsewhere. This is the settled rule of all our cases." * * * "In the present case it is undisputed that there were vacant seats in the car, one of which the plaintiff could and should have taken. He chose instead to stay on the platform. In so doing he took all the risks incident to that position. The injury he received by being thrown against the dasher was the direct consequence of his position, and would not have been received had he been inside." The court added, however, the following remark: "Cases where the car is crowded and no seat is available rest on a different basis. There the traveler, if he is to get on at all, must stand on the platform with its rods, etc., to hold by, or inside with a strap for that purpose. He is presented with a strap for that purpose. He is presented with a choice of evils, and his action must be judged by the jury, while on the other hand the carrier by receiving him undertakes and gives him assurance that it will take care of him and guard him against accident as far as the circumstances permit. *Germantown Pass. Ry. Co. v. Walling*, 97 Pa. 55, 58, p. 253 *Ib.*

In *Bumbear v. Traction Co.*, 198 Pa. 198, "It appeared from the testimony in the case that the plaintiff got on the side step of an open car to ride to his work, at a place where he had taken the cars every morning for several weeks before. The car as usual was full and there was not standing room inside or on the platform. He stood as usual on the side step, which was filled

with passengers. The conductor received his fare and made no objection to his standing on the step. At a place where the street curved, the railway tracks were so near to one side as barely to leave room for a wagon to stand between them and the walls of a hotel building. At this place each morning during the summer, ice wagons stood while ice was delivered at the hotel. On the morning of the accident the hub of a wheel of an ice wagon was so near to the tracks as to project over the side step of the car. The motorman could have seen the position of the wagon when a square from it, and he was signaled by the man in charge of the wagon to stop. He went on without slackening the speed of the car, and the plaintiff was injured by the hub of the wheel striking him." pp. 200, 201, *Ib.* The court held that the case was clearly for the jury, saying: "As the plaintiff was received as a passenger when the car was so full that he could not go inside, and stood on the step with the knowledge and assent of the conductor, he could assume that reasonable precautions would be taken to protect him from such dangers as could be readily seen and guarded against." p. 201, *Ib.*

In *Watson v. Railway Co.*, 91 Me. 584, "The plaintiff, while riding upon the front platform of one of the defendant's electric street cars, was thrown from the car by its sudden jolting, and, striking the ground with considerable violence, sustained more or less injury." In that case the presiding justice directed a verdict for the defendant on the ground, "that the riding upon the platform of a passenger car upon the railroad is such negligence upon the part of the passenger as would bar his recovery for injury sustained by being thrown from the platform in rounding a curve." And again, "it is settled as a question of law that one who rides upon the platform of a car and is injured by being thrown from it as the car rounds a curve is guilty of contributory negligence." The court said: "In our opinion this was not a correct statement of law when applied to a street railroad car, whether propelled by horses, electricity or otherwise. Riding upon the platforms of such cars is too much encouraged by transportation companies and too much indulged

in by the public, for the court to say, as a matter of law, that the mere riding upon the platform of such a car is conclusive evidence of negligence, or is negligence *per se*, or is negligence in law. It depends upon too many other circumstances and conditions for a court to lay down any hard and fast rule in regard to it; but it is a fact which should ordinarily be submitted to the jury in connection with all other circumstances of the case." p. 591, *Ib.* * * * "It is a notorious fact that street railroad companies, whose cars are propelled by electricity, constantly accept and invite passengers to ride upon the platforms of their cars when there is no room inside, and that persons having occasion to use such cars are frequently glad for even a foothold upon the platform, step or footboard. Neither carrier nor public have regarded the street car platform as a known place of danger, and we are not disposed to say, as a matter of law, that a passenger who rides upon the platform of an electric street car is thereby guilty of such contributory negligence as to prevent his recovery for injuries sustained through the fault of an employee of the transportation company. We hold rather that it is a circumstance to be submitted to and decided by the jury." pp. 591, 592, *Ib.*

We think that the views expressed by the learned courts in the cases above cited, all of which cases are referred to in the defendant's brief, fully sustain our view that in the present case a verdict for the defendant could not properly have been directed on the ground that the plaintiff's acts had precluded him from recovery of damages.

The exception to the finding "as against the evidence" raises the question whether the case shows any conduct of the defendant on which it legally can be held liable for the plaintiff's injuries. Negligence is a broad term, including things done or omitted to be done. A common carrier for instance, is "bound to exercise the highest degree of care and prudence, the utmost human skill and foresight." *Coddington v. Brooklyn Ry. Co.*, 102 N. Y. 66. But this rule is not to be so construed as to re-

quire dangers to be avoided which could not reasonably have been foreseen. 2 Sher. & Redf. on Negl., Sec. 496.

The defendant's motion for non-suit was not based on its claim that the plaintiff's evidence showed no negligence on the part of the defendant or that it showed contributory negligence by the plaintiff; but on the ground that the tramcar driver had tried to cross the electric car track without waiting to allow the electric car to precede; the facts that the defendant's motorman started his car after the tramcar had started and without looking towards the tramcar were considered by the trial judge as excusing the tram driver from stopping to await the crossing of the electric car. We think that sitting as the trial judge was doing, in place of a jury, he was justified in so ruling.

The mere facts here mentioned, a prior starting without looking might not, however, justify a finding of negligence on the part of the defendant; the relative distances of the two cars from the nearer rail of the intersecting track; the relative rates of speed or slowness at which the two cars started and began to move; the comparative ease or difficulty of controlling the electric power of the defendant's car and the mules drawing the tramcar are among the factors in a question of negligence or due care in this case, and evidence on these matters was before the trial judge. The motorman testified (page 94, transcript of evidence) that "as he started he looked up the street and saw one of the tramcars coming down at a pretty good lick (p. 98, *Ib.*); referring to the tramcar driver, that the latter "had plenty of time to stop and I never paid any more attention to him and I paid no more attention to this car until I heard it strike into the rear of my car." A witness testified (p. 125, *Ib.*) "that the tramcar was nearer the intersection of the tracks than was the electric car when the latter started. Another witness testified (p. 176, *Ib.*) that "when the electric car started the driver of the tram tried to stop but could not."

The question is not free from difficulty. On the one hand if it be true that the tramcar driver was himself guilty of negligence nevertheless such contributory negligence would not be a

defense, as we think, to an action founded on and sustained by proofs of defendant's negligence. There is no doubt of the correctness of the rule laid down by the United States Supreme Court in *District of Columbia v. Moulton*, 186 U. S., 576, viz:

"Where but one inference can reasonably be drawn from the evidence the question of negligence or no negligence is one of law for the court." And further, as stated by the court in the same case, "When the evidence given at a trial with all the inferences which a jury could justifiably draw from it is insufficient to support a verdict for the plaintiff so that such verdict if returned must be set aside the court is not bound to submit the case to the jury but may direct a verdict for the defendant."

In *Patton v. Texas & P. R. Co.*, 179 U. S. 358, the trial judge had directed a verdict for the defendant and refused to leave the question of negligence to the jury in an action by a fireman for injuries sustained by the turning of a loose step on the locomotive; this course was approved; the court saying: "Where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen cases and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for the conclusion."

Applying the rule of reasonable inferences to the facts of this case, can it be said to be an unreasonable inference, or an inference upon which all persons would agree, that the motorman did not use such care as the circumstances required in going along, relying on the tram driver stopping his mules in time to avoid a collision; or during the few seconds intervening between the starting of his car and reaching the tramcar track, in not looking towards the oncoming mules; or that if he had done so he would not easily have avoided the clash.

We are unable to say, as matter of law, that the judge who heard the witnesses in this case was not justified in finding, upon all of the facts before him, that the defendant was negligent.

The remaining question is whether the trial judge erroneously refused the defendant's motion to order a physical examination of the plaintiff. Upon this question it is first to be observed that the defendant expressly disclaimed at the trial any suggestion of fraud or misrepresentation on the part of the plaintiff. It is next to be observed that the request and motion for this examination were not made by the defendant until after one of the physicians had testified for the plaintiff and another physician for the defendant. On re-direct examination of the defendant's second medical witness, Dr. Moore, the defendant's attorney (p. 232, *Ib.*) asked him, "from what you have now learned of the case can you state whether or not this paralysis, or paresis is liable to be permanent and that that permanency was the result of the accident on the man?" To which the medical witness answered: "I think I would be unable to say until you would make certain electrical tests of the nerves and muscles themselves to find whether degeneration had taken place or not, I do not think any one could tell without such examination."

Whether or not under other circumstances a defendant is entitled to obtain an examination by a physician or surgeon of the physical condition of the plaintiff is a question of law which the circumstances of this case do not require us to determine. Assuming for the purposes of this case, and without determining, that a trial judge had such power; there is no doubt that there is no absolute right of the defendant to demand its exercise, and also "that the examination should be applied for and made before entering upon the trial and should be ordered and conducted under the direction of the court." *City of South Bend v. Turner*, 156 Ind. 426.

The exceptions are overruled.

D. H. Case, Avon II. Crook and C. F. Clemons for plaintiff.
Castle & Withington for defendant.

J. ALFRED MAGOON, Guardian of Kalua Kapukini, a spendthrift, plaintiff in error, v. THOMAS FITCH, defendant in error.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 21, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

GUARDIANSHIP—*jurisdiction to allow counsel fees.*

A Circuit Judge sitting in probate has jurisdiction to allow counsel fees to counsel, representing a ward, in an unsuccessful attempt to obtain revocation of an order of guardianship.

ERROR.

The amount of such allowance is not reviewable on writ of error, except in case of abuse of discretion by the Probate Judge.

OPINION OF THE COURT BY HATCH, J.

This is a writ of error to the Circuit Court for the First Circuit to reverse a decision of Robinson, J., sitting in probate, rendered in the matter of the Estate of Kalua Kapukini, allowing Mr. Thomas Fitch counsel fees to the amount of \$500, for professional services in proceedings brought to obtain a termination of the guardianship under which Kalua Kapukini was restrained as a spendthrift.

A judgment was obtained by Mr. Fitch in the court below on October 7, 1901, Little, J., presiding, discharging the ward from guardianship. This judgment was reversed, on appeal, by the Supreme Court by a decision dated May 7, 1902.

A motion for a rehearing, and to vacate the decision rendered by the Supreme Court, was filed by Mr. Fitch on June 2, 1902,

on behalf of the ward. On this motion coming on for hearing before the Supreme Court, the proceeding was abandoned by Mr. Fitch on the written instructions of his client, the ward, who stated that she did not desire a rehearing, and wished to continue under guardianship. This terminated the proceedings before the Supreme Court. Counsel was remitted to the Circuit Judge for a consideration of his motion for allowance of counsel fees.

On November 14, 1902, an order was made by Robinson, J., sitting in probate, allowing Mr. Fitch the sum of \$500. for professional services on behalf of the ward in the proceedings which had theretofore been had in the cause.

The writ of error calls in question the power of the court to make the allowance. The first assignment denies jurisdiction in the Circuit Court at Chambers, in probate, over the subject matter, or the cause of action, or the person of defendant in error, and sets up that the claim of counsel, being unliquidated, was cognizable only in an action at law.

Jurisdiction is expressly conferred upon a Circuit Judge in probate by §1968 of the Civil Laws to make an allowance for all reasonable expenses of the ward in defending himself against the complaint at the time a guardian is appointed. This would include an allowance of counsel fees. The section is as follows: "When a guardian shall be appointed for an insane person, or spendthrift, the Judge shall make an allowance to be paid by the guardian, for all reasonable expenses incurred by the ward in defending himself against the complaint."

In Section 1975, it is provided * * * "and the guardian of any insane person or spendthrift, may be discharged by any Judge of Probate, when it shall appear to him, on the application of the ward, or otherwise, that such guardianship is no longer necessary."

The same reasons exist for the approval of the appearance of counsel on behalf of the ward, or for the assignment of counsel for the ward, in the latter case as in the former. Indeed they would appear to be stronger in the case of a controversy between

the ward and the guardian, than when the question was solely the necessity of appointing a guardian at all.

Section 1962 provides that nothing contained in this chapter shall impair the right of the court to appoint a guardian ad litem. Construed together we think that the above sections confer upon the Circuit Judges in probate the power to appoint, or to approve of the appearance of, counsel on behalf of the ward, whenever in the opinion of the Judge the interests of the ward require representation by counsel. Moreover the powers conferred by Chapter 126 of the Civil Laws are supplemental, and in addition, to the powers conferred upon Circuit Judges by Section 1145 of the Civil Laws. Paragraph fourth of this section amounts to a general grant of jurisdiction over the subject matter of guardians. The power to make an allowance to counsel in a proper case is necessarily included in the power to appoint counsel, or to approve of the appearance of counsel. The amount to be allowed counsel appearing for the ward is based upon the value of the services to the ward, and the necessity for bringing the proceeding under the circumstances existing in each case. The amount is within the sound discretion of the Judge; though uncertain, it bears no analogy to a claim for unliquidated damages. The court has full power to settle the question without reference to a jury. The defendant in error brought himself within the jurisdiction of the court below when he made an application for an allowance.

The second assignment of error denies the power of the court to make an allowance to counsel representing the ward, except in cases of successful intervention.

We do not think that compensation should be dependent upon success, though it was so held in *Cochrin v. Amsdem, Guard*, 104 Ind. 283. In *Dearborn v. Batten*, 64 N. H. 568, on the other hand, it was held that the recovery of reasonable expenses by a guardian, in resisting an application by the ward for his removal, does not depend upon success. Good faith and the exercise of sound discretion are the controlling factors. We prefer to follow this view. To adopt any other rule would

seem to imply an approval of speculative or contingent fees, which certainly ought not to be tolerated in cases where the client is suffering under any disability.

The cases of *Hehn v. Hehn*, 23 Pa. St. 415, and *In re Conklin*, 8 Paige 450, cited by plaintiff in error are cases of contract with a ward, and are not in point. The case of *In the Matter of Buckwith*, 3 Hun. 443, also cited by plaintiff in error, goes to the exercise of the jurisdiction, rather than to the existence of the jurisdiction. It supports the proposition that the allowance is within the discretion of the court. On page 448, the court says: "Costs are not granted against a person who institutes proceedings to declare a person a lunatic and fails in them, if the prosecution has been in good faith. The same rule is applied when in good faith."

The third assignment does not raise a question of law. Questions of fact dependent upon a consideration of the evidence, and matters of discretion, there being no showing of abuse of **refusing costs**, rests in the sound discretion of the court, and they will not be granted unless the proceedings are for the benefit of the lunatic and are instituted and prosecuted fairly and the attorney of the lunatic fails in an application to traverse or supersede the commission. Indeed the question of granting or discretion, cannot be reviewed upon writ of error.

The propriety of the amount allowed could only be reviewed by an appeal.

The writ of error is dismissed.

J. A. Magoon and J. Lightfoot for plaintiff in error.

Defendant in error in person.

YEE CHIN, SHAR LUM, YEE PING, TOM HEE, TONG KI, CHOI KEE, TON WAI and CHONG KEE, partners under the name of WO SING AND COMPANY, v. Y. ATOY, CHUN POY FAT, HEE TEN, YEE FAT, YAT CHEW and Y. ANIN, partners under the name of KWONG CHONG WAI COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 22, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

ASSUMPSIT—*allegation of promise.*

It is sufficient in general assumpsit for goods sold and delivered to allege the facts from which a promise may be implied, without alleging the promise itself.

EVIDENCE—*general objections to.*

A general objection to the admission of evidence on the ground that it is incompetent is as a rule insufficient if the evidence is admissible for any purpose or if the objection can be obviated.

PROMISSORY NOTE—*unstamped, recovery on original consideration.*

A note originally unstamped may be stamped afterwards in the manner prescribed by statute, and, if it is not stamped and was given in payment for goods sold and delivered and was not paid at maturity, a recovery may be had on the original consideration.

VERDICT—*scintilla of evidence.*

A mere scintilla of evidence is insufficient to support a verdict.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for \$3143.83, the balance alleged to be due for goods sold and delivered by the plaintiffs to the defendants, and also for \$1000, the amount of a note given in part payment for such goods, and for interest. A verdict was directed for the

full amount claimed. The defendants bring the case to this court on several exceptions.

1. The defendants objected at the outset to the introduction of any evidence by the plaintiffs on the ground that the complaint did not state a cause of action. It was to the overruling of this objection that the exception chiefly relied on was taken. No specific defect in the complaint was pointed out at the time, but it is contended that that was unnecessary because the court overruled the objection summarily and declined to hear argument upon it and because a defect of this nature may be taken advantage of at any time—even after verdict. We need not consider these preliminary questions because in our opinion the complaint does state a cause of action.

The alleged defect now pointed out is that no promise is alleged. It will be sufficient to refer only to the count for the balance due on goods sold and delivered. It is alleged, among other things, that the goods were "sold and delivered unto the defendants by the plaintiffs at the special instance and request of the defendants * * * and that the said sum is now due and owing unto the said plaintiffs from the said defendants," but it is not alleged, as was the practice at common law, that the defendants undertook and promised to pay on request.

The common law requirement of an allegation of a promise in a common count in *indebitatus assumpsit* is the result of the historical evolution of that form of action and the resort to fictions—so usual in the early history of the common law,—in order to work substantial justice and meet growing needs without departing from established forms. 1 Ch. Pl. 308; Pom. Rem. & Rem. Rights, Sec. 512; Bliss, Code Pl., Secs. 12, 152, 154; Holmes, Com. Law, 274 *et seq.* Even at common law it was not necessary to use the word "promise". The equivalent of that was sufficient. Whether the allegations in this complaint would be considered as satisfying that requirement we need not say, for the complaint is sufficient under our statutes and practice.

Under the English Common Law Procedure Act and the code practice that exists in many of the United States, under which a plain and concise statement of the facts is all that is required, it is held sufficient to allege merely the facts from which the promise is implied. Common counts are held proper under the code system, but a promise need not be alleged. Thus, in the state of New York, it was formerly held, in one of the cases most frequently cited in support of the common law rule, that a promise must be alleged. *Candler v. Rossiter*, 10 Wend. 487. But after the adoption of the code the contrary view was taken. *Allen v. Patterson*, 7 N. Y. 476; *Cropsey v. Sweeney*, 27 Barb. 310. See also *Wilkins v. Stidger*, 22 Cal. 232, 236; *Kraner v. Halsey*, 82 Cal. 209; *Solomon v. Vinson*, 31 Minn. 205; *Campbell v. Shiland*, 14 Col. 491; *Watkins v. De Armond*, 89 Ind. 553. Although the code system has not been adopted in Hawaii, its principles have been adopted or applied to the extent of rendering unnecessary many of the forms and fictions of the common law. The statutes have for more than half a century prescribed forms of action which do not require useless or fictitious allegations. See C. L., Secs. 1210, 1216, 1232, 1234. The fact that the complaint in this instance does not follow strictly the appropriate statutory form does not make it necessary to consider it a common law pleading subject to all the requirements of that system of pleading. A substantial compliance with the statutory form is sufficient. *Shillaber v. Waldo*, 1 Haw. 21, 27; *Dowsett v. Brown*, 3 Haw. 815; *Heeia Sugar Pl. Co. v. McKeague*, 5 Haw. 101. The statutory provision (C. L., Sec. 1232) applicable to a complaint upon an implied promise to pay for goods sold and delivered permits the cause of action to be set forth "circumstantially with the view to proof." Tested by the substance of this provision, the count in question was sufficient.

2. The exception chiefly relied on in connection with the count on the note was taken to the overruling of the objection made to the admission of the note in evidence on the ground that it was "incompetent, irrelevant and immaterial" and that no

foundation had been laid for its introduction and that the complaint did not state a cause of action. The ground now urged is that the note was incompetent as evidence because it was not stamped as required by the Federal stamp act of 1898. No mention of this specific ground of incompetency was made in the trial court. Other specific objections were made—which, however, were clearly unsustainable. There is no doubt that the note was incompetent as evidence under the count on the note. *Makainai v. Goo Wan Hoy*, 14 H. 607. But can a general objection of incompetency avail when the specific objection is mentioned for the first time in the appellate court? As a rule, it cannot unless the evidence was inadmissible for any purpose and the specific objection could not have been obviated if it had been made. See Thompson, Trials, Secs. 693, 694, 697; 46 Cent. Dig., Col. 944 *et seq.* for a statement of the rule and its reasons and the citation of numerous cases.

It is well settled that an unstamped instrument may be admitted for collateral purposes though not to sustain an action upon it as such. It is unnecessary to say whether the note in question was admissible for any purpose under the count for goods sold and delivered. For it is clear that even if it were not, the objection to it might have been obviated by procuring it to be stamped in the manner provided in Section 13 of the stamp act, as amended (See *Makainai v. Goo Wan Hoy*, 14 Haw. 683, 684), or the first count of the complaint might have been amended so as to permit of a recovery for the consideration of the note, that is, the goods sold and delivered, in payment for which the note was given,—for the note, not having been paid at maturity did not operate as payment for the goods, and a recovery could be had on the original contract. *Wilson v. Carey*, 40 Vt. 179; *Wayman v. Torreyson*, 4 Nev. 124; *Isreal v. Redding*, 40 Ill. 362; *Joaquin v. Warren*, 40 Ill. 459. See also *Hardy v. Collector*, 1 Haw. 488; *Jan Ban v. Tsen Yim*, 15 Haw. 433.

3. In support of an exception to the direction of the verdict, it is contended that there was at least a scintilla of evi-

dence to show that one of the defendant partners had sold half of his interest in the partnership to one of the plaintiffs. It is settled in this jurisdiction that a mere scintilla of evidence is not sufficient to support a verdict. In the present case the testimony of the defendant whose half interest was sold and the written memorandum of the transaction showed beyond question that the sale was to the brother of one of the plaintiffs and not to that plaintiff himself. The complaint was amended so as to make the brother a party defendant.

The remaining exceptions need not be considered as they either are abandoned or raise questions that have been considered already.

The exceptions are overruled.

Thayer & Hemenway for the plaintiffs.

Castle & Withington and *W. L. Whitney* for defendants.

YEE CHIN, SHAR LUM, YEE PING, TOM HEE, TONG KI, CHOI KEE, TONG WAI and CHONG KEE, partners under the name of WO SING COMPANY, v. CHU SOI, CHUM PUI FAT, CHUM YEE FAT, YEE YET CHU and YOUNG AH NIN, partners under the name of KWONG MAU WAI COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 22, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

PARTNERSHIP—*authority of partner to sign, allegation of.*

In an action on a note signed in a partnership name by one partner, it need not be alleged that the partner had authority to sign or

that the partnership was a trading partnership. An allegation that the defendant partners made and delivered the note, etc., is sufficient.

OPINION OF THE COURT BY FREAR, C.J.

This case is similar to that of the same plaintiffs against Kwong Chong Wai Co., *ante*, p. 17, except that the amount of the balance for goods sold and delivered, after crediting the \$1000 note, is \$1556.64.

The decision in that case disposes of similar questions raised in this case, except that the last question in that case is not raised in this case and one question is raised in this case that was not raised in that case, namely, by an exception based on the ground that the complaint did not allege that the note was the obligation of the defendant partners or that they were a trading or mercantile partnership or that the partner who signed the note in the firm name was authorized to do so,—the exception being founded on the presumption referred to in *Lea Bow v. Young Yung*, 11 Haw. 772, that a member of a non-trading partnership did not have authority to sign notes for the partnership.

According to the transcript of the proceedings and evidence this exception apparently was taken to a denial of a motion for judgment on the pleadings, but according to the bill of exceptions it was taken to the overruling of an objection to the admission of any evidence in the case. In either case it was based on the want of allegations in the complaint. It was unnecessary for the complaint to contain the allegations suggested. The allegation that the defendants made and delivered the note, etc., was all that was required in this respect. The authority of a partner to sign a note for the partnership was a matter of proof. The defendants' objection to the admission of the note as incompetent was too general.

The exceptions are overruled.

Thayer & Hemenway for plaintiffs.

Castle & Withington and *W. L. Whitney* for defendants.

ALLEN & ROBINSON, LIMITED, v. ANNIE S. REIST.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 23, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

ASSUMPSIT—*no implied promise or liability by owner to subcontractor.*

An owner is not personally liable in assumpsit upon an implied promise to a subcontractor or materialman for materials furnished to the contractor.

MATERIALMAN'S LIEN—*contract necessary.*

A materialman's lien is dependent upon though not created by contract, express or implied. A mere trespasser has no lien under the statute for materials furnished and used in a building on another's land. An allegation merely that the materialman furnished materials which were used in the building is not sufficient.

PLEADING AND EVIDENCE—*variance.*

There is a variance, justifying a directed verdict, between an allegation of a contract between the owner and materialman and proof of a contract between the owner and a contractor and another between the contractor and materialman.

OPINION OF THE COURT BY FREAR, C.J.

This is an action of assumpsit for \$434.81, the balance alleged to be due for materials furnished by the plaintiff to the defendant to be used in moving, repairing and constructing certain buildings, and for the enforcement of a materialman's lien for the same. The complaint was framed on the theory of an express contract between the plaintiff and the defendant—apparently with the expectation that the evidence would show that a third person with whom the plaintiff dealt directly was acting

merely as the agent of the defendant, but it turned out at the trial that this third person was a contractor who was to do the work and furnish the materials under a contract with the defendant and that in dealing with the plaintiff he was acting on his own account. The court thereupon, on motion, directed a verdict for the defendant on the grounds (1) of nonjoinder of the contractor as a party defendant and (2) variance between the complaint and the proof, to which ruling the plaintiff excepted. In the view that we take on the question of variance it will be unnecessary to consider the question of nonjoinder.

It is obvious that the direction of a verdict was correct in so far as any personal liability in assumpsit on the part of the defendant was relied on by the plaintiff, for there was no contract, either express or implied, between the plaintiff and the defendant. The mere fact that the defendant learned, as she apparently did, from the contractor, before the completion of the work, that he was obtaining from the plaintiff the materials, or some of them, that were going into her buildings would not make her personally liable on an implied promise for goods sold and delivered or otherwise. She had no dealings herself with the plaintiff and naturally would suppose that the materials were furnished to the contractor upon the latter's orders given on his own account as required by his contract—which was the fact.

Such being the case, the only question remaining is whether the action could have been sustained as one solely for the enforcement of the materialman's lien. Although a mechanic's or materialman's lien is a creature of statute and not of contract, yet it is dependent upon and does not exist in the absence of contract. There must be a contract with the owner. A mere trespasser who erects a building on the land of another has no lien. The contract with the owner may be either direct with the mechanic or materialman who claims a lien or it may be with an intermediate contractor—in which latter case there should be a second contract between the contractor and the subcontractor or materialman. It is necessary to allege the contractual relation. Otherwise the complaint would not show facts upon which a lien

could be founded. In the present case, an express contract was alleged between the owner and materialman, but the proof was of a contract between the owner and a contractor and a second contract between the contractor and the subcontractor or materialman. The contract alleged was not proved. The contracts proved were not alleged. The mere allegation that the plaintiff furnished materials which were used in the defendant's buildings was not sufficient for the enforcement of the lien.

The exceptions are overruled.

Kinney, McClanahan & Cooper for plaintiff.

C. W. Ashford for defendant.

E. H. F. WOLTERS v. F. H. REDWARD.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 23, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

LOST BOND—*secondary evidence.*

A party offering secondary evidence of the contents of a lost paper must show that he has in good faith exhausted in a reasonable degree all sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him.

DEGREE OF DILIGENCE.

The character and importance of a lost document will control as to the degree of diligence to be used in the search.

SAME.

In a suit against the principal on a bond by the surety who had paid the bond, the same having been given to a building committee of a Masonic Lodge to secure the performance of a building contract, search for the lost bond having been made of each of the sur-

viving members of the building committee and of the secretary of the lodge and of the attorney who compelled payment by the surety, held secondary evidence was admissible.

OPINION OF THE COURT BY HATCH, J.

This is an action to recover the sum of \$1594.80, being money which the plaintiff had paid on the defendant's account to satisfy the terms of a bond given by the defendant as principal and signed by the plaintiff as surety to a building committee of Hawaiian Lodge No. 1 of Free and Accepted Masons, which bond was given to secure the faithful performance of a building contract entered into between the defendant as contractor and the committee of said lodge as owners. Default was made in the performance of the building contract and a judgment recovered against the defendant Redward by the committee of the lodge in the sum of \$1623.12. Demand was thereupon made upon the plaintiff, as surety upon said bond, for the payment of said judgment. The plaintiff made a compromise and paid the sum of \$1220 in satisfaction of the bond. This action was then brought by plaintiff for indemnity. Upon coming on for trial the plaintiff, having shown that the bond in question was lost, offered parole testimony as to the contents of the bond. This was properly excluded when the offer was first made, plaintiff at that time not having brought himself within the rule; plaintiff subsequently produced as witnesses all of the surviving members of the building committee of the lodge, also the secretary of the lodge, also Mr. Cecil Brown, the attorney who collected the sum of \$1220 from the plaintiff on behalf of the lodge. None of these persons could give any light as to the whereabouts of the bond, although each had been requested to search for the same. Two members of the committee had died, and Mr. Ripley, the architect under whose supervision the building was constructed and who at one time is shown to have had possession of the bond, was not in the country at the time of the trial and no attempt had been made by the plaintiff to obtain his testimony. The fact that Mr. Ripley was not in the country at the time of

the trial would hardly relieve the plaintiff from the imputation of negligence in not having made some search at his office during the year or more in which Mr. Ripley was in the country after the suit was brought. We think, however, that further search of Mr. Ripley became immaterial in consequence of the evidence that the bond was in the hands of Mr. Cecil Brown at the time he made his demand upon the plaintiff. Under all the circumstances of the case we think the plaintiff made a showing of reasonable diligence, in his search for the lost instrument, and that consequently evidence of the contents of the bond should have been received when the same was last offered during the course of the trial. There is no question at all as to the rule in such cases. The rule is clearly laid down in *Simpson v. Dall*, 3 Wall, 460. "In order to show the loss of the letters it was necessary to prove that a diligent search had been made for them where they were most likely to be found. There is no general rule as to the degree of diligence in making the search, but the party alleging the loss is expected to show that he has in good faith exhausted, in a reasonable degree, all sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him." We do not desire to derogate in the slightest from the strictness of the rule. The difficulty lies in the application of the rule. While the case is close upon the border-line we think that the plaintiff went as far as was necessary in order to entitle him to offer secondary evidence. The instrument was one which had never been in the custody of the plaintiff; he had never been entitled to its custody prior to the time of the payment of the bond. There is nothing in the evidence to cast any suspicion upon the plaintiff's good faith in the matter. He should not lose his entire remedy through want of care of others for whose conduct he had no responsibility whatever. The character of the instrument is a material factor in determining the amount of diligence to be used in searching for the lost instrument. This is pointed out in *Wiseman v. H. P. R. R.*, 20 Ore. 429. This case applies the rule with extreme strictness; in fact to a greater degree of strict-

ness than we are disposed to adopt in the case at bar. In that case, however, it is pointed out that "If the document be a valuable and important one, which the owner would be likely to preserve, a more diligent search would be required than if the document is of little or no value. The bond in question changed in character completely upon the payment being made by the plaintiff to Mr. Brown. After payment it became a mere piece of waste paper as far as the lodge was concerned, the payee under the bond, and there is no reason why Mr. Brown should have preserved it. There was absolutely no reason to expect that this paid and cancelled bond should be found among the archives of the lodge. A rule which would have required an examination of every document in the archives of the lodge as a prerequisite to the offering of secondary evidence, under the circumstances of this case, would practically amount to a denial of justice. The same observation may be made in regard to the search of Mr. Brown's office. The document had lost all value as far as Mr. Brown and his clients were concerned and they had no interest in preserving it. The plaintiff would have been entitled to the possession of the bond at this moment. He did not make the payment in person and it does not appear from the testimony that the bond in fact passed into his possession. It should be observed also that the plaintiff is not suing upon the bond. The plaintiff's cause of action is for money paid on behalf of the defendant, at his request. There was no dispute as to the fact of the existence of the bond and it is of importance in the plaintiff's case only as evidence that plaintiff in making the payment on defendant's account was acting with defendant's authority.

As to the deceased members of the building committee, search should have been made among the papers of their estates if there had been any proof whatever that the lost document had at any time been in the individual possession of the deceased members of the committee. We think that such search in this case was unnecessary for the reason above stated that the bond was plainly shown to have been in the possession of Mr. Brown at the

period subsequent to that at which any members of it could have had any interest in the bond.

Under all the circumstances we think the exception should be sustained and a new trial had, and it is so ordered.

J. A. Magoon and J. Lightfoot for plaintiff.

W. T. Rawlins for defendant.

TERRITORY OF HAWAII *v.* JACINTHO A. de NOBRIGA, MATHIAS BAPTISTA and JOAO CORDEIRO.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JUNE 27, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

EXCEPTIONS—*no jurisdiction of questions not raised by.*

This Court has not jurisdiction of a motion to discharge the defendants on the ground presented here for the first time that the record shows no sentence passed in the court below.

EVIDENCE, LARCENY—*propriety of particular question under the circumstances.*

A witness for the prosecution having testified that he visited a locality at night to watch his cattle may properly testify "We had been missing cattle right along and proposed to go up that night and watch for cattle thieves."

SAME.

It is not prejudicial error to rule out on cross-examination of a witness for the prosecution the question whether one of the defendants had a short time before purchased certain cattle for butchering purposes, the defendant himself afterwards having testified fully on the subject.

SAME.

A witness having testified for the prosecution that he had found the hide of the stolen steer under C's house the question asked on

cross-examination whether there was "No attempt to hide it?" is properly ruled out.

INDICTMENT—*avermment of ownership of stolen property.*

The question of an alleged defect in an indictment for larceny of a steer averring the property to be in one The Estate of Wm. H. Rickard, deceased, ought to be raised by demurrer or motion in arrest and not for the first time in this Court on an exception that the verdict is contrary to law and the evidence; but the Court is of the opinion that the indictment is sufficient under the statute.

OPINION OF THE COURT BY HARTWELL, J.

A verdict of guilty was rendered on an indictment charging the defendants with larceny in the second degree in stealing a steer alleged to be the "property of one Estate of Wm. H. Rickard, deceased."

Defendants' counsel filed in this Court a motion for the defendants' discharge on the ground that the record did not show that the defendants had been sentenced. The court denied the motion without calling upon counsel for the Territory to argue. In their brief, however, defendants' counsel cite authorities presented to the court in their oral argument in support of the motion and ask that the same "be considered by the court at this time."

The court sees no necessity for further consideration of this motion: The defendants' counsel in his contention restated in his brief that this court in overruling the exceptions would "affirm the sentence of the court below" misapprehends the statute on the subject. The only questions relating to the bill of exceptions which this court can determine are, "questions of law or mixed law and fact which shall be properly brought before it on exceptions". Section 1164 C. L. This motion of defendants is not presented in any manner authorized by statute nor does it present any subject within the jurisdiction of this court.

The exceptions relied on by the defendants are as follows:

A witness for the prosecution having testified that he and several others had gone on a certain night to a field "to watch our cattle" was asked "Why did you go up there to watch those

cattle?" to which he replied, "We had been missing cattle right along and I proposed to go up that night and watch for cattle thieves." The defendants excepted to the denial of their motion to strike out this evidence.

It is urged for the defense that this was error as the only purpose of the testimony could have been to work upon the prejudices of the jurors and to attempt to cast suspicion upon the defendants as to their alleged thefts, and cases were cited to the effect that evidence of other thefts by the defendants would not be admissible. The evidence objected to, however, does not tend to show that the defendants had been guilty of other thefts but as a proper explanation of the motive of the witness in being in the place where he was by night and watching for cattle thieves generally. It could only be a guilty conscience which would ascribe to the testimony the inference that it was the defendants who had been guilty of other thefts. The evidence that the witness had been missing cattle right along and was watching for cattle thieves could only injure the defendants upon the unfounded and unasserted claim that they were the ones who had stolen other missing cattle.

The same witness was asked by defendants' counsel upon cross-examination, "Do you know whether a short time prior to November 27th Jacintho Nobriga purchased certain cattle for butchering purposes?" The question on objection by counsel for the prosecution that it was immaterial was ruled out, defendants' counsel excepting. If it were assumed that this question was proper enough on cross-examination, although not appearing to be material, yet as the defendant afterwards testified fully on the subject (p. 98, transcript of evidence) it cannot be said that the defendants were prejudiced by the ruling out of the question.

A further exception of the defendants was to the ruling out of the following question in their cross-examination of the witness Kaekuawela, viz:

"Then after you went up to find the hide at the house of Cordeiro you stated that the hide layed out there with no at-

tempt on the part of whoever put it there to hide it?" Witness having upon direct examination testified that the hide "was under Jacintho Cordeiro's house" the defense was not entitled to require the witness upon cross-examination to state anything more than what he saw, he could not be required to give inferences such as the question suggested.

Upon the defendants' exceptions to the verdict as "contrary to the law, to the evidence and to the weight of the evidence" their counsel now for the first time claim that the indictment is fatally defective in laying the property of the steer in "The Estate of Wm. Rickard, deceased." A verdict is contrary to law, within the meaning of an exception of this nature, when it is contrary to law as claimed and ruled upon at the trial. In each instance questions of law having arisen and been ruled upon exceptions lie to the rulings; but upon this claim of a defect in the indictment there has been no ruling upon which an exception lies.

A demurrer or a motion in arrest of judgment would have raised the question of the validity of this indictment and secured a ruling from which an exception would regularly lie.

While we do not like to rule upon questions of law not so presented as to come within the jurisdiction of this court, yet as counsel on each side have argued upon the question of the alleged defect in the indictment we have considered the question in order to avoid occasion for a writ of error, and are of the opinion that the averment of ownership in the indictment is sufficient under the statute which declares "It is enough that it appear that it is not the taker's and that it does not appear to be derelict; and in case of doubt whether a thing is derelict, the presumption is that it is not so." Sec. 130, P. L.

The words "Estate of A. B., deceased," mean nothing else than the estate which belonged to "A. B., deceased"; no other meaning could possibly be intended. No one for a moment would be misled by the usual form of notice in probate "In the matter of the estate of A. B., deceased". Common usage has sanctioned this personification of "estate". The word "of" does

not necessarily mean present possession, but if such were its meaning, the averment would not allow the inference that the steer was derelict but would require an inference that it was not the taker's.

The exceptions are overruled.

Lorrin Andrews, Attorney General, *E. A. Douthitt*, for the Territory.

E. M. Watson for defendants.

WILLIAM R. CASTLE, Trustee, plaintiff in error, v. KAPIOLANI ESTATE, LIMITED, defendant in error.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 29, 1904.

DECIDED JULY 11, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

WRIT OF ERROR—*parties*.

All of the parties to an action must join in a writ of error, unless there has been a severance of interests.

JUDGMENT—*must conform to findings*.

It is error to enter several judgments in ejectment where several parties are made defendants and one cause of action only is set out. Judgment must conform to the verdict or findings.

OPINION OF THE COURT BY HATCH, J.

Error to the Circuit Court for the First Circuit. The Kapiolani Estate, Limited, brought its action in ejectment against William R. Castle, Trustee, Philip L. Weaver and William Hoogs, defendants. A decision, trial having been had jury waived, was rendered in favor of the plaintiff and against the

defendants. Upon this finding two separate judgments were entered, one against the defendants Weaver and Hoogs, the other against the defendant Castle, trustee. On the judgment first named a writ of possession issued and due service was made, putting the plaintiff in possession of the land in question. The defendant, Castle, sued out a writ of error raising the question, among other assignments, of the power of the court to enter several judgments on the record in the case.

It is objected by the defendant in error that no writ of error lies to correct a judgment in a jury waived case where there is no other error in the record. Sections 1443-1444, C. L., are referred to. Section 1444 provides that writs of error shall lie to any decision or ruling by a justice or judge in any case in which jury has been waived. It is not necessary to decide whether or not the words "decision" or "ruling" are broad enough to include "judgment". Section 1445 clearly authorizes a writ of error to correct any error appearing on the record either of law or fact, or for any cause which might be assigned as error at common law. This extends to errors arising in cases tried by a judge, jury waived, as well as to other cases, and disposes of the objection.

It is further objected, by the defendant in error, that the writ should be dismissed for the reason that all the parties below are not made parties to the writ. *Crowler v. McIntyre*, 9 Haw. 306. This is clearly the general rule and the objection would be good unless plaintiff in error has brought himself within some well established exception. The objection is to the jurisdiction and can be raised at any time. It was not raised by motion to quash, and the whole record is now before us. The record shows that the plaintiff in error, at the time of suing out the writ of error, was the sole party in interest who could attack the judgment entered below. By the entry of separate judgments, and by the taking out and service of the writ of possession against the defendants Weaver and Hoogs, there resulted an effectual and complete severance of their interests from the interests of the defendant Castle, trustee. The interests having

been severed, the case is brought within the exception pointed out by the Supreme Court in *Simpson v. Greely*, 20 Wall. 152. In that case, after stating the general rule, the court says: "Since this decision was published the question has frequently been presented to this court and has uniformly been determined in the same way where it appeared that the interest was joint and that no severance had been effected either in the judgment, or by subsequent summons and severance, or by some proceeding of an equivalent character. Undoubtedly this case shows what the general rule is, but it is equally well established, where some of the parties in interest refuse to join in a writ of error, or plead, that the others are entitled to resort to the process and proceeding of summons and severance to enable them effectually to remove the cause from the subordinate court into the appellate tribunal for re-examination." The execution having been satisfied, as far as the defendants Weaver and Hoogs were concerned, they would have had no right to join in the writ of error. It would have been an idle proceeding to summon them in to make an election when the right to elect was no longer theirs; their rights were absolutely foreclosed and put at rest. The plaintiff in error therefore, being the only party who has any rights which can now be inquired into, is the sole party in interest in this proceeding.

Coming now to the question of the power of the court to enter several judgments, under the facts in this case, we are of the opinion that no such power existed. The defendants were sued jointly; damages might have been recovered against all; there was only one cause of action. Separate defenses would not make a judgment several which was founded on a single cause of action. A single recovery was had, under the decision filed in favor of the plaintiff. This would support only a single judgment against all the defendants. The defendants were not severally in possession of specific portions of the land claimed, as was the case in *Ching On v. Amana*, 6 Haw. 625. In that case several judgments were entered against the different defendants, but that was in consequence of findings against the defend-

ants severally. The judgment followed the verdict. There were no separate findings made in this case which would support separate judgments; and under the testimony we fail to see how any such separate findings could have been made. No authority existed for splitting up the judgment and entering up several judgments against the defendants. Judgment is entered at the instance of the prevailing party. He has no power however to depart from, or modify, the verdict or findings, nor to add anything thereto. He can neither change the rights of the parties, as established by the decision or verdict, as between him and them, nor as between the adverse parties themselves. There is no principle more firmly established than that the judgment must follow, and conform to, the verdict or findings. *Dawson v. Shirk*, 102 Ind. 184; *Diedrich v. N. U. R. Co.*, 47 Wis. 662; *Stafford v. King*, 30 Tex. 257. Where two defendants are sued jointly there should be but one judgment and one record. If entitled to recover at all against both defendants, plaintiff is entitled to but one verdict, one judgment, and one satisfaction. *Hundhausen v. Bond*, 36 Wis. 29. "In an action of tort against several defendants, if the jury returns a joint verdict against them, judgment should be rendered against them jointly; and this, notwithstanding defendants may have pleaded separately. *Eames v. Stevens*, 26 N. H. 117; *Pickle v. Byers*, 16 Ind. 383.

"In an action of trover there can be but one assessment of damages. Though one defendant is defaulted and the other found guilty, yet there must be one joint judgment. The verdict which is to fix the amount of damages, fixes it as well as for the party defaulted as for the party who pleaded." *Gerrish v. Cummins*, 4 Cush. 391.

The case of *City Savings Bank v. Whittle*, 63 N. H. 587, cited by defendant in error as an authority for the entry of separate judgments, does not conflict with the views above expressed. That case authorized separate findings against the several defendants. It does not support the entry of judgment differing from the findings.

The defendant in error, while conceding in general that only

one judgment can be rendered in a joint action, urges that it is within the power of this court to now enter such judgment in the case as in their opinion the facts will warrant. This would be so were the whole case before the court. Judgment has been satisfied as to the defendants who were in default by the issue and service of the writ of possession. This court, therefore, has no authority over that portion of the record which supports the writ of possession and which has passed beyond the domain of litigation. The court cannot now amend the judgment against Weaver and Hoogs by adding the other defendant as a party to that judgment. As above pointed out, the interest of the defendant Castle, trustee, was severed from those of the other defendants. That portion of the record which affects the plaintiff in error is alone open to review. The only judgment which we can enter in this case, therefore, is to set aside the separate judgment entered in the court below against William R. Castle, trustee, and it is so ordered.

The case is remanded to the Circuit Court.

Castle & Withington for plaintiff in error.

Kinney, McClanahan & Cooper for defendant in error.

THERESA O. WILCOX v. Q. H. BERREY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 24, 1904.

DECIDED JULY 18, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

MOTION TO DISMISS.

An oral motion to dismiss a complaint for not stating a cause of action having been argued in the Circuit Court and overruled and

exception taken and allowed to such overruling, the case showing a formal demurrer for the same cause filed in the District Court from which, after a hearing upon the merits and judgment for the defendant, an appeal was taken to the Circuit Court, the motion is treated as a demurrer.

LIABILITY FOR CAUSING ANOTHER TO BRING A MALICIOUS SUIT.

Whether the averment that the defendant assigned to one M. a judgment with the intention that M. should bring an action upon it is a sufficient averment to make the defendant responsible for an action brought by him, *quaere*; the complaint in this case disclosing no cause of action against the defendant if he had brought the action himself.

MALICIOUS PROSECUTION—*abuse of process*.

An action for malicious prosecution of a civil suit imperatively requires a termination of the suit in favor of the defendant. In this case the defendant was alleged to have acquired by assignment a judgment against the plaintiff which he knew had been paid, partly in cash and the balance in a promissory note of the plaintiff's husband upon which the defendant had obtained judgment. He assigned the former judgment to M. with the intention that M. sue upon it, which he did, recovering judgment, for which the plaintiff is now liable, and levying upon her personal property.

Held, that this was neither an action for malicious prosecution of a civil suit, the suit having terminated in favor of its plaintiff; nor an action for malicious abuse of process, there having been no unlawful or unauthorized use of process and that the complaint sets forth no actionable wrong.

OPINION OF THE COURT BY HARTWELL, J.

This case was commenced in the District Court of Honolulu which gave judgment for the defendant. The plaintiff appealed to the Circuit Court, in which the jury rendered a verdict as follows:

"We the jury in the above entitled cause find for the plaintiff and against the defendant in the sum of \$159.60 damages, but we do not think that defendant had any malicious intent."

The substance of the complaint is:

That March 17, 1899, the Hawaiian News Co., holding plaintiff's promissory note in the sum of \$90.00, brought action upon it in said District Court and obtained judgment in the sum of

\$102.10, but the note was kept by the company. Plaintiff afterwards made payments aggregating \$45.00 to the company on account of the judgment but no entry was made in the record, although each payment was endorsed upon the note. April 12, 1901, the defendant Berrey, acting as agent for the News Company, took from plaintiff's husband, R. W. Wilcox, his promissory note payable on demand to the defendant, for \$156.20, in settlement of the balance owing on the judgment as well as of certain claims of the News Company against himself.

That May 10, 1901, the defendant sued R. W. Wilcox in said District Court on said demand note and obtained judgment thereon in the sum of \$176.60, which judgment is still outstanding.

That September 13, 1901, the defendant "wickedly and maliciously contriving and intending thereby to injure this plaintiff in credit and estate and to put plaintiff to great annoyance, trouble and expense," procured from the News Company an assignment to himself of the judgment first above mentioned and December 10, 1901, assigned that judgment to one Middleditch, well knowing at the time that he made the assignment that the judgment had been paid and satisfied, and intending that Middleditch should immediately thereafter bring an action upon it against the plaintiff. That Middleditch then brought his action against the plaintiff on the judgment so assigned to him and December 20, 1901, obtained judgment thereon in the sum of \$135.93, which judgment on appeal to the Circuit Court was confirmed and is now outstanding, and execution has been issued thereon and levied upon plaintiff's property.

That the defendant's acts have resulted in making the plaintiff liable to pay a second time the judgment so assigned, and were done "with malice and without probable cause and with intent to oppress and persecute this plaintiff through the forms of law",—*ad damnum* \$300.

At the opening of the case the defendant's counsel moved that the action be dismissed "on the ground that neither the petition nor the opening remarks of counsel contained or disclosed facts

sufficient to constitute a cause of action." Exception was taken to the denial of this motion. Defendant also excepted to the form and substance of the verdict and to the denial of his motion that a verdict be directed in his favor.

In the brief of plaintiff's counsel the motion to dismiss the complaint is noticed by the mere remark, "There was no demurrer filed but were it otherwise the complaint sets forth a cause of action which insures against dismissal."

In some jurisdictions a motion to dismiss appears to serve the same purposes as a demurrer. The practice of filing a motion to dismiss instead of a demurrer has not become established here, but as the defendant filed a formal demurrer in the District Court we will consider this motion in the Circuit Court on appeal, as a demurrer.

The contention of the defendant is that Middleditch in bringing an action on a judgment assigned to him in ignorance that the judgment had been paid and satisfied did no wrong for which he could be held liable, and that the defendant Berrey is not liable for any injurious consequences resulting to this plaintiff from the action brought by Middleditch.

How far the averments in the complaint would justify the inference that the defendant by the mere assignment of a judgment to Middleditch was responsible for an action brought upon it it is unnecessary to decide in the view that we take of this case, which is, that the complaint discloses no cause for which this defendant could have been held liable if he had himself brought the suit complained of.

Assuming for the purpose of this argument that the complaint sufficiently avers that the defendant instigated or procured the bringing of the suit which is complained of, the case presented by the pleadings is that the suit was successful although based upon a claim which the defendant knew had been satisfied.

Upon the question whether a false and malicious suit gives to the defendant a right of action for damages unless the suit involved the arrest of the defendant or seizure of property or some special grievance manifestly importing legal damage other

than such as is incident to the ordinary defense of a suit there is considerable diversity of American judicial opinion.

But even the courts which hold that an action lies if no other injury is done than to vex and annoy a defendant and cause him the expense of engaging counsel uniformly hold that the suit complained of shall terminate in favor of the defendant before he can bring an action against the plaintiff for its malicious prosecution.

The reason for this requirement is variously stated. It is not until the suit is ended that it can be judicially ascertained whether it is justifiable or brought in malice and without probable cause. Malice alone is not enough; there must also be want of probable cause for bringing the action to make one liable for its malicious prosecution.

"Or, as the reason has more commonly been stated, if the suit for the alleged malicious prosecution should be permitted before the prosecution itself is terminated, inconsistent judgments might be rendered,—a judgment in favor of the plaintiff in the action for the prosecution and a judgment against him in that prosecution; and it is often said that judgment against the party prosecuted would show the prosecutor had reasonable ground for his conduct. The judgment would, according to this view, show that the prosecutor had violated no duty to the other party." Bigelow on Torts, 72.

Unless the doctrine of *res judicata* applies in such matters litigation might be interminable, and therefore the requirement of the law is imperative that the first action shall have terminated in favor of the defendant in order to give him a right to sue the plaintiff on the ground that the action was brought maliciously and without probable cause.

The plaintiff in this case was unsuccessful in her defense of the former case. It is immaterial whether the defense that the judgment on which the suit was brought had been paid was not presented at all or was not sustained by the proofs or was erroneously held by the trial judge to be bad in law. The plaintiff had her day in court in that case and cannot sustain this action

by a re-trial of the case which she lost, upon any theory of a malicious prosecution of that case.

The plaintiff's counsel, however, claims that the case is of the nature of an action for the malicious abuse of process.

There is no abuse of process in bringing or (in the absence of conspiracy) causing another to bring an action on a false claim and obtaining judgment thereon and levying execution upon it. An action for malicious abuse of process does not require a termination of the proceeding complained of nor want of probable cause for its institution.

"In this connection, attention should be directed to actions for abuse of the process of the courts. An action is given by law for such an action without requiring the plaintiff to prove either the termination of the proceeding in which the abuse of process has taken place, or the want of probable cause for instituting that proceeding. * * * To maintain such an action, however, the plaintiff's case must be something other than a proceeding for a malicious prosecution. The ground of action must be, not a false prosecution (that is, a prosecution upon a demand or accusation which has no foundation in fact), but an unlawful use of legal process." Bigelow, *supra*, 89, 90.

But it is essential to such actions that something shall have been done under color of process which the process was not intended to authorize or permit.

"There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it." *Mayer v. Walter*, 64 Penn. 286.

Bigelow gives as instances of abuse of process, levying an execution for double the amount due, and the wrongful levy of an attachment. *Sommer v. Wilt*, 4 S. & R. 191; *Stewart v. Cole*, 46 Ala. 646.

The author adds, however, "These are cases of the wrongful resort to rather than of abuse of process." In the former of the cases just cited, the defendant had directed the sheriff "to levy nearly double the sum due on a judgment obtained by the defendant against the plaintiff, and causing the sheriff so to levy and

to sell the goods of the plaintiff to an amount exceeding the sum due on which the execution was issued." The execution was issued on a judgment which had been confessed on a bond in the sum of \$12,400 conditioned for the payment of \$6,200. The goods levied on to the amount of \$11,997.50 were chiefly merchandise, sold at a great sacrifice.

That was a case of intentional use of a legal judgment for an illegal purpose, since the penalty in the bond was merely to secure the amount of the actual debt.

Barrett v. Reed, 51 Penn. 190, was a case of maliciously taking out execution on a judgment against the plaintiff known by the defendant to have been paid. The court held that, "If the defendant knew that the debt had been paid, it was an abuse of legal process to attempt to enforce the payment of the judgment and collect the debt again. The issue of the execution under such circumstances was not a lawful act."

"The common law action for abusing legal process is confined to the use of process for the purpose of compelling the defendant to do some collateral thing which he could not lawfully be compelled to do." *Johnson v. Reed*, 136 Mass. 421.

In this case there are none of the elements of an action for malicious abuse of civil process, nor are we able to find in the case a statement of any actionable wrong on the part of this defendant. While it is true that an unsuccessful prosecution of a false and malicious suit may cause great injury for bringing which suit civil liability may be incurred and that a successful suit would do still more harm, yet litigation must end somewhere. To allow a defendant who has lost his case to sue the plaintiff for damages on the ground that the plaintiff's claim was false and malicious would give him his day in court a second time with no good result to our system of administering justice in courts of law.

Upon the averments in this complaint this plaintiff had a perfectly good defense in law, if it was true in fact, to the suit which the defendant brought against her. A purchaser of a judgment which has been paid, although without notice of the

payment, is not immune from the defense of payment. He is not like a *bona fide* purchaser for value or a purchaser of negotiable paper not overdue. The plaintiff's remedy for failure to make good her defense of payment, whether in fact or in law, is not by an action for malicious prosecution or for abuse of process.

The following cases discuss the questions involved in the present case: See *Closson v. Staples*, 42 Vt. 209; *Bitz v. Meyer*, 40 N. J. L. 252; *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. Div. 674; *Cottrell v. Jones*, 11 C. B. 1113; *Smith v. Burrus*, 106 Mo. 94; *Pangburn v. Bull*, 1 Wendell 345; *Antcliff v. June*, 81 Mich. 477. See also Pollock on Torts, 6th Edition, 1901, page 307, *et seq.*

The views here expressed make it unnecessary to consider the effect of the verdict in its apparent elimination of the essential ingredient of malice.

The exception to the denial of the motion to dismiss the complaint is sustained, the verdict is set aside and judgment for the defendant *non obstante* is ordered, and the cause is remanded to the Circuit Court for that purpose.

C. W. Ashford for plaintiff.

T. McCants Stewart for defendant.

H. KENDALL v. C. S. HOLLOWAY, Superintendent of Public Works, T. R. LUCAS, C. LUCAS and J. LUCAS, partners under the name of LUCAS BROTHERS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JULY 15, 1904.

DECIDED JULY 18, 1904.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE GEAR IN PLACE OF HATCH, J., DISQUALIFIED.

JURISDICTION—*Circuit Judge, title and address of bill in equity.*

A bill in equity should not be dismissed in the appellate court merely because its title and address describe the court as the "Circuit Judge" without the words "at Chambers".

TRANSCRIPT OF EVIDENCE.

Leave to file a transcript of the evidence is denied for noncompliance with rule 4 of the Court.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal by the defendant Holloway from a decree enjoining him as Superintendent of Public Works and the other defendants as contractors from entering into a proposed contract under which the latter defendants were to construct a school building and two dormitories at Lahainaluna, Maui, for the sum of \$35,516, in accordance with a tender made by them in response to an advertisement by the Superintendent calling for tenders,—the ground of the injunction being that after advertisement a change was made in the specifications without a new advertisement.

In this court the appellant moved for the first time to dismiss the bill on the ground that it was not brought in any court

having jurisdiction thereof—the argument being that it was before the Circuit Judge whereas it should have been before the Circuit Judge at Chambers. It is contended that this, as a question of jurisdiction, may be raised at any stage in the case. Jurisdiction was in fact taken by the Circuit Judge at Chambers. The summons was a chambers summons. The bill is in the usual form of a bill in equity and therefore cognizable only by a Circuit Judge at Chambers. It is also entitled a bill for an injunction and the answers are further entitled in equity. The only foundation for the contention made seems to be that the description of the court in the title is “Before a Circuit Judge of the Circuit Court of the First Circuit, Territory of Hawaii” without the words “at Chambers” and that the bill is addressed “To the First Judge of the Circuit Court of the First Circuit, Territory of Hawaii” without the words “at Chambers”. The address need not contain the words “at chambers”. It has been customary here as well as elsewhere to address bills in equity to the judge or the chancellor without the words “at chambers” and there is nothing in our statutes requiring a different practice. As to the description of the court in the title, the statute makes no specific requirement. The contention is that the words “at chambers” are essential because the statute confers the jurisdiction upon the “Circuit Judges at Chambers” and not upon the “Circuit Judges.” (C. L., Sec. 1145, as amended by Laws of 1903, Act 32, Sec. 11; *Hind v. Wilders’ S. Co.*, 14 Haw. 215, 223), and that there is therefore no court known as that of a “Circuit Judge”; that there are but two classes of courts presided over by Circuit Judges, namely, “Circuit Courts” proper, that is, at term, and the courts of “Circuit Judges at Chambers”. Even if the form of the title of the court in the bill should be given the importance attached to it by counsel, the title in this instance could not be held fatally defective. The words “Circuit Judge” are often used both in the statutes and in practice as synonymous with “Circuit Judges at Chambers”. When the bill as a whole is considered, it is obvious that it was intended to be brought, as it was in fact brought, before the Circuit Judge

at Chambers. The usual title in matters of this kind is "In the Circuit Court of the Circuit, Territory of Hawaii, at Chambers," and this doubtless is sufficient, though not strictly in conformity with the statute. *Kala v. Mills*, 15 Haw. 422. The words "at Chambers", or their equivalent should be used in describing the court in chamber cases when the words "Circuit Judge" are used as well as when the words "Circuit Court" are used, though the necessity is naturally much greater in the latter case because "Circuit Court" without the words "at Chambers" means at term, but the absence of such words cannot be regarded as fatal when the words "Circuit Judge" are used under circumstances like those in the present case. This case is very different from that of *Kona Coffee Co. v. Circuit Court*, 10 Haw. 571, in which a bill in equity was entitled, brought and heard in the Circuit Court at term.

The appellant further sought to show that the complainant was not a taxpayer and so not entitled to bring this suit. For the purpose of showing this he moved for a postponement of further hearing for the purpose of enabling him to obtain a transcript of the evidence and for leave to file it when obtained. This motion was denied on the ground that no sufficient showing was made for failure to obtain the transcript as required by rule 4 of this court.

There being no other question in the case before this court, the decree appealed from is affirmed.

Ballou & Marx for plaintiff.

M. F. Prosser, Assistant Attorney General, for defendant Holloway.

IN THE MATTER of the APPLICATION of R. MAKa for
a Writ of *scire facias*.

PUNILAMA v. MELE.

SUBMITTED JUNE 21, 1904.

DECIDED JULY 25, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

Scire facias, writ of.

Application for a writ of *scire facias* on a judgment made November 20, 1868, in an action of ejectment: denied, it appearing by the application that the surviving defendant in the action claims by adverse possession.

PLEA OF STATUTE OF LIMITATIONS.

A plea of the statute of limitations in a proceeding for a writ of *scire facias* is good in law if sustained by evidence.

OPINION OF THE COURT BY HARTWELL, J.

The petitioner, R. Maka, files an application for a writ of *scire facias* to issue to one Mele (w) to show cause why a certain informal judgment made by this court November 20, 1868, should not be formally entered and execution thereon issue against said Mele for the possession of certain land in Honolulu described in the petition.

The record referred to shows that one Punilama, and her husband, Awahua, brought an action of ejectment against said Mele and her husband, Maikai, for the premises described in this application. Jury was waived and the Court, Davis, J., at the close of the plaintiff's case made an order of non-suit from which the defendants took a bill of exceptions to the court in

banco. The exceptions were sustained and a new trial was ordered. The following is the final record in the case:

"Supreme Court.

Nov. 20th, 1868,
As of Octob'r Term.

"Punilama

"vs.

"Mele et al.

In banco

Ch. Jus. Allen

Jus. Hartwell

Jus. Austin.

"The court by Justice Austin rendered opinion, as verdict, "giving judgment to the plaintiff for the land, but without "damages.

"L. McCULLY, Clerk."

The application sets forth, "That subsequently thereto, no formal judgment was entered by the clerk and no execution taken out thereon, but that the said Punilama and her husband Awahua entered into possession of said premises under said judgment, but that said Mele thereafter continued to live upon a portion of said premises, described as follows: the two makai rooms of a house standing on the Ewa side of the said land and against the fence, the said house facing towards Waikiki.

"That subsequently to said judgment, by mesne conveyances, the interest of said Punilama, who was the owner of said premises and who recovered by said judgment, has been conveyed to your petitioner, R. Maka.

"That as your petitioner is informed and believes, the said Mele continued, after the Hawaiian fashion (being a friend of the former owners of the land) to live in said rooms, and so far as your petitioner knows, without paying any rent therefor other than occasionally paying something towards the water rates, but without making any claim to any right in the premises or to remain there, excepting by the consent of said Punilama and her successors in title, until a recent time, namely: within less than one year, when she, under the advice of others, first made two claims that she had a right to the land; *first*, that she had a right to the whole land under a deed from Punilama, being the same deed adjudicated to be void in this action; and *second*, that she had a right to live there on account of long residence; and being notified, declined to remove from said land. That said Maikai is dead."

The petitioner claims that this court has jurisdiction under

Section 79, Judiciary Act, 1892, which reads as follows: "All matters before the present Supreme Court in Banco shall be retained and disposed of by the Supreme Court established by this Act as if the same had come up or arisen under the provisions of this Act; and provided further, that except as above provided all causes which shall have been wholly or partially heard at the time when this Act shall go into effect, shall proceed to the completion thereof in the courts or before the justices before whom the trial of such cases has been begun, and such courts and justices shall have jurisdiction to proceed with the hearing of such causes to judgment or other disposition thereof, anything in this Act to the contrary notwithstanding."

The petitioner's counsel claim that under the authority of the *Estate of Kealiiahonui*, 9 Haw. 675, this court ought to order the judgment above recited to be formally entered in the names of the original parties and a writ of possession to issue thereon in favor of the petitioner against the surviving defendant, Mele.

It is further claimed that *scire facias* is not a new action but a continuance of the old, and that a defendant remaining in possession after judgment holds by permission of the plaintiff who recovered judgment, citing *Root v. Woolworth*, 150 U. S. 401; *Harmes v. Coryell*, 177 Ill. 505; *Hartridge v. Smith*, 89 Ia. 271.

The petitioner claims that *Waldron v. Craig's Heirs*, 14 Peters, 147, is authority for the rule that the statute of limitations does not run in favor of the defendant in *scire facias*.

In that case the original defendant having died the writ was sued against his heirs and two other persons as tenants in possession. The court said: "But how is the lapse of time to operate? It is not pretended that there is any statute or rule in Kentucky which limits a revival of the judgments; and it is very clear that at law lapse of time can only operate by way of evidence. From lapse of time and favorable circumstances, the existence of a deed may be presumed, or that an obligation has been discharged; but this presumption always arises under pleadings which would render the facts presumed proper evidence. A demurrer raises only questions of law, on the facts

stated in the writs of *scire facias* themselves. No evidence is heard; and consequently, there is no ground for presumption from lapse of time." That decision does not deny the right to plead the statute of limitations in *scire facias*.

The rule invoked by the petitioner, that a party whose title is divested by decree quieting the title to the land in the plaintiff "will be treated and considered as holding his possession in subordination to the party in whose favor the decree is rendered until he gives notice that his holding is adverse and that he claims ownership in himself," does not mean that evidence is inadmissible to show adverse possession within the meaning of the rule.

Scire facias, "is in the nature of an action because the defendant may plead to it; and in many cases it has been classified as in substance a new action." *Brown v. Chavez*, 181 U. S. 68 (1901).

None of the cases cited by petitioner's counsel go to the extent of holding that the statute of limitations cannot be pleaded in a proceeding in *scire facias*.

We are of the opinion that such a plea, if supported by evidence, would be good in law in such proceedings.

As this court has not jurisdiction to entertain such a plea, which requires a jury trial, the application for the writ must be denied, and it is ordered accordingly.

Castle & Withington for petitioner.

PALOLO LAND & IMPROVEMENT COMPANY, LIM-
ITED v. WONG QUAI, et al.

MOTION FOR REHEARING.

SUBMITTED JULY 25, 1904.

DECIDED JULY 25, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

REHEARING—motion for, orally denied, it appearing that none of the matters referred to in the motion had been misapprehended or overlooked by the court.

Plaintiff's motion for rehearing of the decision made by this court April 16, 1904; 15 Haw. 554. The grounds of the motion are stated in the opinion.

The following opinion of the court was orally given by

HARTWELL, J.

As the matter appears to us, without calling upon counsel for the appellees to argue it, this motion of the appellant for rehearing ought not to be granted; the grounds stated in the motion are that this court "misapprehended the amount of water in the Waiomao stream in the dry season, and overlooked the fact that by a previous decision the said Dam 'D' took five-sevenths of the water at the dam; also overlooked the fact that the 29 acres 'B' in Kekio was not only watered by this Dam 'D' but also by water taken from Dam 3 or Humu by means of the reservoir, the said 29 acres 'B' being all taro land."

We are unable to say from the showing that has been made to us by counsel who presents this motion, and who was not in the former hearings, or from examining the opinion of the Court,

that any of these matters have been misapprehended or overlooked.

The court came to its conclusions of fact after an examination of a great mass of testimony, and in its opinion passed upon these matters referred to in the motion. On the showing in favor of rehearing the case, we feel that we ought to deny the motion, and it is so ordered.

Castle & Withington, T. McCants Stewart and L. Andrews for plaintiff.

Kinney, McClanahan & Cooper, S. H. Derby and Holmes & Stanley for defendants.

W. R. CLARK and SAMUEL HENERY, copartners under the firm name of CLARK & HENERY, v. H. HACKFELD & COMPANY, Limited, and CASTLE & COOKE, Limited.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JUNE 28, 1904.

DECIDED AUGUST 2, 1904.

FREAR, C.J., HATCH, J. AND GEAR, CIRCUIT JUDGE, IN PLACE OF HARTWELL, J.

CONTRACT—GUARANTY—*What constitutes absolute guaranty.*

A written instrument addressed to a firm of contractors, and signed by the respective agents of two corporations, which recites that the agents knowing that the directors of the corporation "have this day pledged the above companies to pay you \$26,000 upon the opening of Pearl Harbor, by the completion by you, and the acceptance by the United States Government of a channel into said Pearl Harbor of 200 feet wide at the bottom and 30 feet deep, do hereby guarantee said payment as per resolutions passed, cop-

ies of which are in your possession," is an absolute and independent undertaking on the part of those signing it to make the payment upon the contingency stated, and not a collateral contract of guaranty dependent for its validity upon the existence of another contract between the corporations and the contractors.

Id—Id—acceptance of offer.

The action of the contractors in such a case in entering into a contract for the dredging of Pearl Harbor, and their completion of the work to the satisfaction of the United States Government, which accepted the work, was sufficient acceptance of the guaranty contained in the written instrument signed by the defendants, and is sufficient to support a finding of an acceptance of the offer.

Id—Id—consideration—assumption of obligation.

Where the contractors, after the receipt of such writing from the defendants, entered into a contract with the United States Government to dredge Pearl Harbor, relying upon the undertaking of the defendants to pay them the sum of \$26,000 in addition to the amount of their bid, the entering into such contract with the United States Government constituted a valuable consideration for the promise of the defendants to pay them the \$26,000 additional, regardless of whether or not the defendants would be benefited thereby.

Id—Id—satisfaction with work.

The fact that the resolution of the directors of one of the companies pledged the company to pay part of the \$26,000, provided that the agents of the company "are satisfied that the opening of the channel to Pearl Harbor will open the same to commerce," and that the contract of the defendants was to "guarantee said payment as per resolutions passed," did not render it necessary, in order to make such agents liable on their contract, for the contractors to prove that the agents were satisfied after the work was completed, that it opened the harbor to commerce, as the action of the agents in signing the contract amounted to an unequivocal expression of satisfaction on their part that the opening of the channel, according to the specifications, would open the same to commerce.

Id—Id—meaning of "guarantee."

While due weight should be given to the use of the word "guarantee" in an instrument, its use is not, by itself, conclusive as to the legal effect of the instrument; as it may be used to express an original undertaking, and a qualified guarantee may be expressed even without its use.

Id—offer—notice of acceptance—evidence—actual knowledge.

Notice of the acceptance of an offer need not be proven by direct testimony but may be inferred, and may come from any source. Knowledge that the offer has been accepted is equivalent to notice when notice is necessary.

Id—consideration—what constitutes—evidence.

Consideration for a contract involves the surrender of a legal right or the incurrence of a legal obligation. It need not be expressed in the contract but may be shown by evidence *aliunde*.

OPINION OF THE COURT BY HATCH, J.

This is an action of assumpsit, brought by the plaintiffs, Clark & Henery, against H. Hackfeld & Company, Limited, and Castle & Cooke, Limited, upon a written undertaking to guarantee the payment to the plaintiffs of the sum of \$26,000 upon their completion of certain dredging work, and the acceptance of the same by the United States Government. The United States, through the appropriate office of the Engineer Corps of the Army, had called for tenders for dredging a channel through the bar at the entrance to Pearl Harbor in the island of Oahu. The amount of the appropriation available not appearing to be sufficient to pay the cost of the undertaking, and it appearing that the opportunity to have this harbor opened might be lost for a long and indefinite period, if the appropriation then made available by Congress was not expended at that time, private parties interested in the work, took steps to induce bidders to undertake a contract. The directors of the Ewa Plantation Company, Limited, whose lands are situated in the Pearl Harbor basin, bordering upon, or accessible to the lagoon, passed the following resolutions:

“Whereas, the United States Government has advertised for tenders to open Pearl Harbor, and

“Whereas, Messrs. Clark & Henery, a reliable firm of contractors, will agree to put in a bid to the United States Government to complete this work as above for the sum of \$94,000.00 provided they are guaranteed the additional \$26,000.00

“Therefore Be It Resolved, that we, the Directors of the Ewa Plantation Company, do hereby pledge our Company to pay

AUGUST, 1904.

its pro rata of the aforesaid \$26,000.00, upon the completion and acceptance of the work by the United States Government, this Company's pro rata to be determined according to the joint interests of all plantations that may join in the guarantee."

The directors of the Oahu Sugar Company, Limited, whose lands are similarly located, passed the following resolutions:

"Whereas, the United States Government has advertised for tenders to open Pearl Harbor, and

"Whereas, the appropriation available is only \$94,000.00 and the necessary work to be performed to make the channel 200 feet wide at the bottom and 30 feet deep will require an expenditure of \$120,000.00, or \$26,000.00 in excess of the appropriation available, and

"Whereas, Messrs. Clark & Henery, a reliable firm of contractors, will agree to put in a bid to the United States Government to complete this work as above for the sum of \$94,000.00 provided they are guaranteed the additional \$26,000.00

"Therefore Be It Resolved, that we, the Directors of the Oahu Sugar Company, do hereby pledge our Company to pay its pro rata of the aforesaid \$26,000.00, upon the completion and acceptance of the work by the United States Government, this company's pro rata to be determined according to the joint interests of all plantations that may join in this guarantee.

"Provided this sum does not exceed $\frac{1}{3}$ of \$26,000.00, viz: \$8,666.66

"And Provided that the agents of the Company Messrs. H. Hackfeld & Company, Limited, are satisfied that the opening of the channel to Pearl Harbor will open the same to commerce."

The defendants thereupon entered into the following written obligation which they deliver to the plaintiffs.

"Honolulu, H. I., Feb. 12th, 1901.

"Messrs. Clark & Henery,
City.

Dear Sirs:—

We, the undersigned, agents of the Ewa Plantation Co. and the Oahu Sugar Co., knowing that the directors of the above Companies have this day pledged the above companies to pay you \$26,000.00 upon the opening of Pearl Harbor, by the completion by you and the acceptance by the United States Government of a channel into said Pearl Harbor of 200 ft. wide at

the bottom and 30 ft. deep, do hereby guarantee said payment as per resolutions passed, copies of which are in your possession.

Yours very truly,

Castle & Cooke,

J. B. Atherton,

President.

H. Hackfeld & Co., Limited,

Paul Isenberg,

President."

The plaintiffs, relying upon the foregoing assurances, put in a tender and obtained a contract for dredging a channel as aforesaid. This contract they faithfully carried out, to the satisfaction of the Federal officials, who accepted the work and paid the contract price. Demand was then made by the plaintiffs upon the defendants for the payment of said sum of \$26,000. Not obtaining payment, action was brought. The defendant H. Hackfeld & Company, Limited, answered, filing a general denial. The defendant Castle & Cooke, Limited, answered confessing judgment for, and paying into court, two thirds of the sum sued for, with interest, costs and attorney's fees, and disclaiming any release as to its joint liability for the balance. Jury was waived. The court, on the trial of the cause, found that all of the material allegations set forth in the complaint had been established by competent testimony, and entered judgment for the plaintiffs and against the defendants for the remaining one third of the \$26,000 claimed, to wit: \$8,666.66 with interest, costs and attorney's fees. The defendant Hackfeld & Co. excepted to the findings as being contrary to law and the evidence, moved for a new trial, and upon its motion being overruled, brought the case here on bill of exceptions.

The numerous questions raised by the bill of exceptions were at the argument grouped by the defendant under three heads, which as set out in defendant's brief are as follows:

1. Are H. Hackfeld & Company, Limited, liable under their contract of guaranty, assuming that all of the conditions thereof have been fulfilled?

2. Have the conditions in fact been fulfilled?

3. Is Pearl Harbor open to commerce?

1. The construction of the written obligation sued upon is at the foundation of plaintiffs' case. Is it, as contended by defendant, a pure contract of guaranty, dependent for its validity upon the existence of another contract between the plaintiffs and the alleged principals, or is it an absolute and independent undertaking on the part of the defendants who signed it to make a definite payment on a contingency stated. As tending against the construction claimed by the defendant it should be observed that the undertaking in question is absolute in form. It is not even made conditional upon the default of the Ewa Plantation Company and the Oahu Sugar Company. It is a positive undertaking to "Guarantee said payment" upon the completion of the work under contemplation. The only contingency stated as a prerequisite to the liability of the defendants is that the work should be completed in a stated manner and to the satisfaction of certain persons. This is a very different obligation from that which would result if the letter sued on had set out a definite contract between the plantation companies and plaintiffs, or had referred to such a contract by terms sufficiently definite to identify it, and had then proceeded to guarantee that such contract was a good and enforceable contract, and that defendants would make good any loss resulting to plaintiff, up to the amount named, in case plaintiffs should fail to collect from the principals. We are not at liberty to so radically change the obligation signed by defendants as to incorporate into it the above terms and qualifications. Yet it would be necessary to read them into the contract in order to construe it in the manner contended for by defendant. To constitute the contract a guaranty of another prior contract between the principals and the plaintiffs there must be harmony as to the subject matter and amount involved. What contract could have existed between the plantations and the plaintiffs by virtue of the resolutions? The resolutions show that in the case of the Ewa Plantation Company, Limited, authority was given to pledge said company for its pro rata of \$26,000; and in the case of the Oahu Sugar Company,

Limited, the limit of one third of \$26,000 was definitely expressed. If contracts had been made with the plaintiffs in pursuance of these resolutions we should have had two several contracts for limited amounts on the one hand, and the defendants' joint obligation for \$26,000 on the other. Manifestly the latter obligation would be concurrent and not subsidiary and collateral to the others. But if such primary contracts never in fact were made, and there is no showing that they ever were, it becomes a matter of demonstration that the contract sued on was an original undertaking, if it has any validity at all. Defendant not only admits that no such contracts ever existed, but argues that as the principal was never bound the surety can not be. This would be very well as to the discharge of a principal; but as applied to this case the absence of an original undertaking between the alleged principal and the plaintiffs is of itself quite persuasive as to the construction to be put on the defendants' contract, viz: that it is an original contract, and the only question remaining would be, has it the necessary elements to render it good in law as an independent contract. This will be discussed later. Defendant contends that the defendants' contract was "a pure contract of guaranty incapable of any other construction, and that it is clearly not an independent promise as plaintiffs contend." By this we presume the defendant means a collateral contract of guaranty, which would call for notice of default on the part of the principal, and action against the principal, before the guarantors could be called upon to make good their guaranty.

One of the recognized tests to distinguish an absolute guaranty from a collateral one is whether the contract definitely guarantees a payment, as distinguished from a course of conduct by another; or that a written instrument is of a given character, or has a given value. The following are examples of undertakings held to be absolute:

"For value received we guarantee the within note until paid",
City Sav. Bank v. Hopson, 53 Conn. 453.

"We sign the above note for security for *payment* thereof,

which we hereby guarantee for a valuable consideration received," *Beardsley v. Hawes*, 71 Conn. 39.

An example of a conditional guaranty is, a guaranty that a note is "good and collectible," *Bull v. Bliss*, 30 Vt. 127. In *Woodstock Bank v. Downer*, 27 Vt. 539, the language was "I guarantee the said note is good, and the payment of the same." The court says: "Though the guaranty that the note was good, standing alone, might have been but a conditional promise, yet when it is added "and the payment of the same", it evidently becomes an absolute promise. It is a promise that the makers will pay the note according to its tenor; no notice then that the makers had not paid the note was necessary." In the case at bar it is payment which is guaranteed.

As to the use of the word "guarantee" it may be observed that, while due weight must be given to the fact of its use, the word by itself is not conclusive as to the legal effect of the instrument. A qualified guaranty may be expressed without the use of the word "guaranty" at all. So on the other hand "guaranty" may be used to express an original undertaking. Two instances occur in the resolutions of the plantation companies in this case of non-technical use of the word guaranty. In the last preamble both companies set out that Messrs. Clark & Henery will agree to undertake the work, "provided they are *guaranteed* the additional \$26,000." and at the end of the first resolution the language used is, the "pro rata to be determined according to the joint interests of all plantations that may join in the guarantee." Yet it is not contended that the plantations were acting as sureties of another. There is no reason to suppose that the word "guarantee" is used in the defendants' contract in a sense different from that in which it is used in the resolutions. If used in the same sense the legal effect of defendants' guaranty would be this: Defendants, after reciting certain facts of which they had knowledge (the fact that Oahu Sugar Company, Limited, and Ewa Plantation Company, Limited, had this day pledged themselves to pay plaintiffs \$26,000 upon the opening of Pearl Harbor by the completion by plaintiffs and the accept-

ance by the United States Government of a channel into said Pearl Harbor 200 feet wide at the bottom and 30 feet deep) say to plaintiffs we (also) guarantee the payment of said sum to you. This would amount to a concurrent, not a subsidiary contract. In *Hilt v. Smith*, 21 How. 283, the word guaranty is construed as follows: "although the term 'guaranty' is usually applied to a collateral undertaking to pay the debt of another, yet when taken in connection with the other terms of the instrument, this is (in this case) clearly an original, independent contract. If it had been under seal the word "*covenant*" would have been the technical synonym for the word 'guaranty' as here used." In this case the plaintiff sold his land to a railroad company for shares of stock on the guaranty of defendants that the shares would be worth par in three years from date; and on the further guaranty, that if not then worth par, the railroad company should then make up to him, or pay him, whatever sum the stock should be worth less than par. It was held that the conditions of the contract required no previous suit to be instituted against any one as principal debtor. We consider this case conclusive authority in support of the construction which we place upon the writing sued upon; namely, that it is an original and independent contract.

Is the contract sued on good in law as an independent contract? It is objected first that no proof was made of the acceptance of the guaranty contained in defendants' letter. It is doubtful if any notice is required in a case like the present even if the contract is held to be a guaranty. This is not such a case as would call for notice of acceptance by the custom of merchants, as when advances proposed to be made to a trader are guaranteed. In the case of unilateral contracts the performance of the act specified in the offer as the consideration makes the promise binding. Notice of acceptance is generally unnecessary. Harriman on Contracts, §149. In *Bascom v. Smith*, 164 Mass. 61, speaking of the case of the offer of a promise for an act the court says: "Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for *the doing of*

the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time *after doing that which constitutes the acceptance.*"

In the case above given as an example, the guaranty of a trader's account, the reason for notice of acceptance is plain. The relations would be likely to extend over a long period of time and it would be only reasonable that the guarantor should know whether or not such an obligation has become a fact.

Notice of acceptance need not be proved by direct testimony but may be inferred. "It may have come from the plaintiffs, or the makers of the note, or from other source", *Woodstock Bank v. Downer*, 27 Vt. 539. Knowledge that the offer has been accepted is equivalent to notice, when notice is necessary. *Barnes Cycle Co. v. Reed*, 91 Fed. 481. We think the evidence supports the finding upon this point.

It is next urged that no consideration has been shown for the contract. "Consideration involves the surrender of a legal right or the incurrance of a legal obligation", Harriman, Cont. §106. It is not necessary that the consideration should be set out in the contract. *Cummings v. Dennett*, 26 Me. 397. It may be shown by the proofs to exist. We think the evidence amply justifies the finding of a consideration, which must have been found to support the decision of the court below. After the receipt of defendants' letter, and in consequence of it, which is a fair inference from all the facts shown, plaintiffs incurred a very onerous legal obligation: to wit, they entered into a contract with the United States to dredge the bar at the entrance to Pearl Harbor in accordance with the specifications prepared by the Army Engineer in charge. The facts recited in the preamble of the resolutions of the directors of the plantation companies, which defendants made a part of their contract, show that the work was undertaken by plaintiffs in consequence of the undertaking to pay the plaintiffs the sum of \$26,000 in addition to

the amount of their bid. The contract entered into by plaintiffs constituted a valuable consideration which fully supported defendants' promise. What induced defendants to make the promise, and what value, if any, plaintiffs' work might prove to defendants severally, are matters which have no bearing upon the question of their liability. The burden undertaken by plaintiffs in consequence of defendants' promise makes the consideration. If at the time defendants made their promise to plaintiffs the latter had been under a contract with the Government to do the dredging, some other consideration must have been shown. But such was not the fact. The subsequent undertaking of the government contract by plaintiffs, together with the facts set out in the resolutions above quoted, answer the contention of defendants' counsel that from all that appears plaintiffs were fully compensated for their work by the United States Government. We therefore hold that the instrument sued on is valid as an original promise on the part of defendants and that the evidence supports the finding on the same for the plaintiffs.

Defendants' second main contention is that the conditions of the contract of February 12, have not been fulfilled in that it has not been shown that the defendant H. Hackfeld & Company, Limited, was satisfied that the opening of the channel of Pearl Harbor would open the same to commerce, or that said corporation was satisfied when the work was completed that it did open the said harbor to commerce. The reference in defendants' contract to the resolutions in the words "as per resolutions passed" renders the latter a part of the contract. The only question is as to the satisfaction of the agents of the Oahu Sugar Company, Limited, Messrs. H. Hackfeld & Company, Limited. The other provisions of the resolutions have been complied with. The satisfaction called for, is not satisfaction with the manner in which the work might be performed; that matter was left to the Federal officials solely. There is little or no analogy therefore to the case of a contract calling for the performance of work to the satisfaction of an architect. The satisfaction required is as to

an extraneous fact, namely, whether "the opening of the channel to Pearl Harbor will open the same to commerce." These words are so vague as to be practically void for uncertainty. The nature of the commerce, the size and description of the vessels to engage in it, in order that it should come within the meaning of commerce as there contemplated by defendants, are left uncertain. In fact whether anything more than the legal status of the harbor was in contemplation it is impossible to determine. The plaintiffs should not suffer from the ambiguity. *Lawrence v. McCalmont*, 2 Haw. 425. We are quite satisfied, however, that this proviso can not be extended to any other obstacles to navigation which may exist in other portions of the harbor. What was under contemplation, as is clearly expressed in the proviso, was "the channel to Pearl Harbor" and the work there to be done. There may be said spits, rocks, and innumerable perils in the harbor itself, which may render navigation hazardous. These, however, can not have any bearing on the question whether or not the bar at the entrance has been removed. The ease of navigation is not a factor. It is significant that the proviso uses the present tense: Provided that the agents, &c., are satisfied. This would indicate that the satisfaction in question was to be determined before any contract was entered into. It was in the power of the defendant, Messrs. H. Hackfeld & Company, Limited, at that time to have terminated the whole negotiations between the plantations and the plaintiffs if they were not satisfied that the nature of the operation then under contemplation would prove efficacious. Instead of doing so, they signed the subsequent contract of February 12th. This contract, whatever other view may be taken of it, clearly amounted to an unequivocal expression of satisfaction, on the part of the signers, that the opening of the channel of Pearl Harbor would open the same to commerce. The requirements of the proviso are therefore shown to have been fully complied with.

3. The view which we have taken of the nature of the defendants' undertaking, and the construction to be placed on it, ren-

ders unnecessary any further discussion of the question whether Pearl Harbor is open to commerce.

The exceptions are overruled.

Atkinson, Judd & Mott Smith for plaintiffs.

Kinney, McClanahan & Cooper for defendants.

THOMAS MULLEN v. JOHN WALKER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JULY 18, 1904.

DECIDED AUGUST 2, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

PROCESS—*Amendment, seal and signature.*

The copy of a summons served on the defendant may be amended, at least under the statute authorizing amendments of process, by adding the seal of the court if the copy already bears the signature of the clerk.

OPINION OF THE COURT BY FREAR, C.J.

This case, in assumpsit, comes here on plaintiff's exceptions to (1) the granting of defendant's motion to set aside the service of summons on the ground that the copy served upon the defendant did not bear the seal of the court, and (2) the denial of plaintiff's motion to amend the said copy by placing the seal thereon.

The trial court made these rulings against its own views—on the supposition that it was bound to do so by the decision of this court in *Hayashi v. Iwata*, 14 Haw. 627. In our opinion the view of the trial court was correct, and the decision referred to did not require it to hold otherwise. Not to mention minor points of difference between that case and this, there were these

two of importance: in that case both the seal of the court and the signature of the clerk were lacking while in this only the seal is lacking, and there was at that time no statute authorizing amendments of process, while now there is such a statute. Laws of 1903, Act 78. Although there are divergent views elsewhere as to the power to amend process in respect to the signature and seal whether under or in the absence of general statutory authority to amend process as well as pleadings, the better view seems to be that when either the signature or the seal is present the process may be amended as to the other—at least under statutory authority to amend process. In such case the court is not wholly without jurisdiction. There is something to amend and something to amend by, as it is said. See cases cited in the decision above referred to.

The exceptions are sustained, the rulings excepted to reversed and the case remanded to the Circuit Court for further proceedings consistent with this opinion.

T. McCants Stewart for plaintiff.

W. T. Rawlins for defendant.

IN THE MATTER OF THE WILL OF CHARLES NOT-
LEY, deceased.

SECOND MOTION FOR REHEARING.

SUBMITTED JULY 20, 1904.

DECIDED AUGUST 2, 1904.

FREAR, C.J., HATCH, J., AND CIRCUIT JUDGE DEBOLT, IN PLACE
OF HARTWELL, J.

REHEARING—*denied, no palpable error shown.*

A rehearing should not be granted merely that the case may be presented again as at the first hearing in the hope that the court may be induced to come to a different conclusion, and in the absence of a showing of palpable error or grievous wrong.

OPINION OF THE COURT BY FREAR, C.J.

The will and codicils were admitted to probate by a Circuit Judge at Chambers. On contestants' appeal to the Circuit Court on the issue of undue influence, a different Judge presiding, a verdict was directed for the proponents on the ground that there was no evidence of undue influence that could properly be submitted to the jury. On contestants' exceptions, this court sustained the directed verdict. 15 Haw. 435.

Contestants then moved for a rehearing, their principal contention being that the court in holding that there was not sufficient evidence of undue influence to go to the jury, did so on the erroneous theory that in order that indirect or circumstantial evidence of undue influence (that being the character of the evidence relied on) should be submitted to the jury, it should be of a nature clear and convincing to the court, whereas the court should have proceeded on the theory that the jury were the sole judges as to whether the evidence was clear and convincing and that the court should have acted on the theory that any evidence more than a scintilla would be sufficient. The court denied the motion for a rehearing, holding that the original decision did not bear out the contestants' contention as to the construction of that decision; that the court in that decision proceeded on the theory that the evidence should be submitted to the jury, whether it was clear and convincing to the court or not, if there was any material evidence upon which a verdict could properly be based; that to grant a rehearing in the case would be to do so merely in order that the entire case might be presented again substantially as at the first hearing in the hope that the court might be induced to come to a different conclusion; that that should not be done; that few if any cases had been presented to the court with greater thoroughness and earnestness than this case, and that there appeared no sufficient reason for granting a rehearing. 15 Haw. 700.

The contestants now move a second time for a rehearing, accepting the statement of the court as to its construction of the

original decision, but contending that they were justified in placing upon that decision the construction which they relied on in their first motion for a rehearing and that this fact together with their claim that the original decision was a "palpable error and grievous wrong" is sufficient justification for their filing this second motion for a rehearing, and that they should now be granted a rehearing in order that they may show that there was sufficient evidence to go to the jury.

It is obvious from the foregoing that there are several preliminary questions that invite consideration and perhaps decision, but we will pass them without further notice. For it remains true, as was stated in the decision on the first motion, that this matter was presented with unusual thoroughness and earnestness at the original hearing and that to grant a rehearing would be to do so merely that the case might be presented again substantially as at that hearing in the hope that the court might be induced to come to a different conclusion, and we may add now that no sufficient showing has been made that the original decision was a "palpable error and grievous wrong"—which is the chief claim relied on to justify this second motion for a rehearing.

The motion is denied.

Holmes & Stanley and Cecil Brown for proponents.

Kinney, McClanahan & Cooper and J. J. Dunne for contestants.

CHARLES GAY, J. K. KAPUNIAI, O. BLACKSTAD and
W. A. WRIGHT, plaintiffs in error, v. J. K. FARLEY,
Tax Assessor and Collector, Fourth Division, defendant
in error.

ERROR TO THE CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED JUNE 22, 1904.

DECIDED AUGUST 5, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

BOND—*of deputy assessor to assessor, held in trust for Territory.*

An assessor holds a bond given to him by his deputy under C. L., Sec. 842, for the benefit of the Territory and not merely for his own protection.

ALTERATION OR SPOILIATION—*quaere, whether assessor a party or stranger.*

Quaere, whether a material change made in such a bond by the assessor should be considered an alteration by a party claiming thereunder or by one in privity with such party, or a mere spoliation by a stranger.

ID—*Independent collateral agreement on margin, not alteration or spoliation.*

A statement that one of the sureties had been given permission to withdraw from the bond, signed by the assessor and written in the margin of the bond below the names of the witnesses and above the certificate of approval of the bond, is an independent collateral agreement, and not an alteration or spoliation of the bond.

RELEASE OF SURETY—*assessor cannot effect, by collateral agreement.*

An assessor can not by an independent collateral agreement release a surety on such a bond so as to defeat an action upon it against the sureties for the benefit of the Territory.

EVIDENCE—*when admissions of principal, admissible against sureties.*

Admission of a principal as to the fact and amount of his shortage are evidence against the sureties, if they were made during the

term covered by the bond and in connection with his official duties. Quaere, whether they are evidence also when made after the expiration of the term, in an action against both principal and sureties on a joint obligation.

Id—*harmless error, not ground for new trial.*

The admission against the sureties, of admissions made by the principal after the expiration of his term is harmless error, when there is ample other uncontradicted evidence of the fact and amount of the shortage, including admissions made before the expiration of the term.

PAYMENT—acceptance of I. O. U's.

The treasurer's acceptance, from the delinquent deputy assessor, of I. O. U's of other persons to the amount or in excess of the amount of the shortage does not operate as payment or satisfaction so as to release the sureties from liability, if the I. O. U's were accepted for collection or for what they were worth, even if the treasurer had authority to accept them in full satisfaction at all.

OPINION OF THE COURT BY FREAR, C.J.

E. E. Conant, tax assessor and collector of the fourth taxation division, an officer appointed by the treasurer of the Territory and under bond to him, appointed one of the plaintiffs in error, W. A. Wright, deputy assessor and collector for the district of Waimea in said division and, in pursuance of statutory requirement, exacted from him a bond for the faithful performance of his duties. This was a joint and several bond, dated January 2, 1902, in the sum of \$6,000, payable to Conant and his successors in office by the said Wright as principal and the other plaintiffs in-error as sureties, and was approved by Conant as to amount and sufficiency of sureties. The names of all the sureties were in the body of the bond before it was signed by any of them, and the other two sureties signed after Blackstad. In March following, after some correspondence between Blackstad, Conant and the treasurer, growing out of a request by Blackstad to be released from the bond, Conant wrote to him that he was "relieved from all further responsibility" and also indorsed on the bond, in the space below the names of the witnesses but above the certificate of approval of the bond, these

words: "O. Blackstad has been given permission to withdraw from this bond. E. E. Conant." In July following, it was ascertained that Wright was short in his accounts \$2,848.40. He turned over to the treasurer I. O. U.'s of various persons for more than the full amount, on which \$643.80 was afterwards collected, and finally this action was brought by the defendant in error, Conant's successor in office, for the balance, \$2,204.60, against the principal and all the sureties on the bond, and, after trial by the court, jury waived, judgment was recovered for that amount and costs. Many exceptions were taken and embodied in a bill of exceptions, and now this writ of error is brought to reverse that judgment. Only a few of the twenty-seven assignments of error are relied on.

The main contention is that the surety Blackstad was released, and that his release operated in law as a release of the other sureties. It will be unnecessary to say what the effect of a release of one surety would be upon the liability of the others under the circumstances of this case, or what the effect would be as to delinquencies by the deputy assessor prior to the release, or whether in this case the delinquencies all occurred after the supposed release, because in our opinion the attempted release was ineffectual for want of authority in the assessor to grant a release.

Some attempt is made to add strength to the theory of an effectual release by the contention that the treasurer assented to it. For the treasurer is the assessor's superior in office, and the statute (C. L., Sec. 842, 3rd paragraph) provides that "it shall be the duty of the treasurer and the several assessors to from time to time ascertain and assure themselves of the sufficiency of the sureties on any of the bonds hereinbefore required; and he or they or either of them shall require new sureties at any time when the sureties on such bonds shall, in their opinion, become insufficient." Even if this provision could be construed as authorizing a release of a surety as well as a requirement of new sureties, when necessary, it is at least doubtful if it would authorize the treasurer to act with reference to deputy

assessors' bonds any more than it would authorize assessors to act with reference to their own or each others' bonds. "Hereinbefore" apparently refers to the act and not merely the section, and the language of this paragraph may have been intended distributively—the treasurer to pass upon bonds given to him by assessors under Section 841 and assessors on bonds given to them by their deputies under the first paragraph of Section 842. But, however that may be, the evidence was such as to permit a finding that the treasurer declined to act in the matter on the ground that he was without authority and that he merely referred the request for a release to the assessor.

The bond must be regarded as made to the assessor in his official capacity and for the benefit of the Territory and not merely for his own personal protection. He held it as a trustee for the Territory. It was on a printed form, and was made to him as assessor and to his successors in office, though that is not expressly prescribed by the statute. The bond is required by the statute and its conditions and minimum amount and the minimum number and the qualifications of the sureties are prescribed by the statute. The assessor is required to pass upon the sureties and to assure himself from time to time of their continued sufficiency and to require new sureties when necessary. The deputy cannot enter on the duties of his office until his bond has been filed and accepted. C. L., Sec. 842. Similar provisions are made in the preceding section in regard to the assessors' bonds, which are given to the treasurer, who appoints the assessors, but it could not be held that such bonds are for the personal protection of the treasurer. See *Sutherland v. Carr*, 85 N. Y. 105; *Hopkins v. Plainfield*, 7 Conn. 286. The fact that the assessors are made responsible for the acts of their deputies (C. L., Sec. 844) does not show that their deputies' bonds were intended to be merely for their own protection.

Regarding, then, the assessor as holding the bond for the benefit of the Territory, what authority had he for releasing the obligation of the sureties to the Territory? He was not given such authority expressly. The duty to require new sureties

when necessary does not imply an authority to release present sureties. Nor does the duty to require a bond of the amount and with the sureties prescribed, imply a power to release sureties. On the contrary the statute seems carefully designed to guard against anything that would jeopardize the public interests or lessen the security of the Territory under the bond.

The argument of counsel for the sureties is based largely on cases relating to the alteration or spoliation of instruments—either on the theory that the indorsement of the release on the bond amounted to an alteration of the instrument or on the theory that the reasoning of such cases would apply by analogy to this case. An alteration made by an obligor would, of course, not relieve him, for he would not be allowed to take advantage of his own wrong. But a material alteration by a party claiming under the instrument would vitiate it as to him as against nonconsenting parties, for it would be against public policy to permit him to take his chances of tampering with the instrument and destroying its identity without also the chance of loss in case of detection. He could not recover on the original instrument because that by his own fault no longer exists, nor on the instrument as changed, because that was not assented to by the obligor. This rule is enforced with special strictness in favor of sureties, for they are favorites of the law and their liability is *strictissimi juris*. But a change by a stranger is considered a mere spoliation as distinguished from an alteration and does not prevent a recovery by an innocent party. There is a distinction between a change in an instrument and a change in the contract. The former might operate as a release even though not so intended. In the present case there was an attempt to change the contract. If this could be regarded also as a change in the instrument it would be the view most favorable to the plaintiffs in error. But if it was a change in the instrument, it is at least doubtful if it was not a mere spoliation and not an alteration, or, in other words, there is much reason for holding that the assessor was a stranger and not a party for purposes of this kind; that he was not as agent of the Territory or as a party in

interest or otherwise clothed with authority to release a surety as against the Territory, an innocent party, for whose benefit he held the bond. The extent of his authority was matter of law and presumed to be known. Even if he could under some circumstances sue on the bond for his own benefit, so that an alteration made by him would be a good defense to such an action, it would not necessarily be a good defense to an action brought, as this is, solely for the benefit of the Territory. See *Ford v. Jefferson County*, *infra*, for a bond of a dual nature.

A large class of cases, some of which are now relied on, is distinguishable from this case. They are cases in which the bond never became operative as consented to, as where the name of a surety was erased or the body of the bond materially changed by an officer before its approval by or delivery to the proper officer and in such a way as to show that it had been altered, or where the name and signature of an intended surety was omitted after he had been approved when it was understood that he was to be a surety, or where it was omitted before approval with knowledge on the part of the approving officer that the other sureties understood that the omitted surety was to join. See *Smith v. United States*, 2 Wall, 234; *Fairhaven v. Cowgill*, 8 Wash. 686; *State v. Craig*, 58 Ia. 238; *State v. Allen*, 10 So. (Miss.) 473; *United States v. O'Niell*, 19 Fed. 567; *Blanton v. Commonwealth*, 20 S. E. (Va.) 884. This distinction is well illustrated by *State v. McGonigle*, 101 Mo. 353, in which the alteration was made before acceptance or approval, and *Pemiscot County v. Scott*, 104 Mo. 26, in which the change was made after approval. See also *Bingham v. Shaddle*, 45 Neb. 82. The present case is distinguishable also from the class of cases in which a change is made in the contract with or obligation of the principal. See *Reese v. United States*, 9 Wall. 13; *Miller v. Stewart*, 9 Wh. 680.

The view has been taken in a number of cases that an officer who approves a bond or who holds it as custodian for a state or county should be regarded as a mere stranger and a change by him as a mere spoliation. In *Pemiscot County v. Scott*, 104

Mo. 26, cited *supra*, the bond was given by a collector to the county, and the name of one of the sureties was erased after the bond had been approved. The court said: "It is true it does not appear by whom this erasure was made; but it could not have been made by the county. It must have been made by the surety or some county officer, or some third person. Such conduct on the part of the surety would not release him from liability on the bond. The alteration of a bond by an officer who is by law simply the custodian of it will not affect its validity. The mutilation of an official bond by such an officer or by any third person is spoliation and nothing more, and does not relieve the principal or any surety from liability thereon to the county." See also *Medlin v. Platte County*, 8 Mo. 235. In *State v. Berg*, 50 Ind. 496, what was held an immaterial alteration was made in the body of the bond, but the court said on the question now under consideration: "Where an alteration is made by a stranger to the instrument, without the participation of the party interested, it is a mere spoliation, and the rights of the parties are not affected. * * * The bond of a township trustee is required to be filed and kept in the auditor's office. * * * He becomes, therefore, its custodian, but he does not thereby become any more a party than if it were not filed in his office, or any more than any other stranger. There is no more reason why a spoliation by him or his deputies should destroy the validity of a bond thus placed by the law in his custody, than there is that a spoliation by any other stranger should have that effect. * * * It would be a startling doctrine to hold that the legal custodians of the various official and other bonds, required by law to be given, could release the obligors by making material changes in the bonds." In *Horn v. Whittier*, 6 N. H. 88, the bond was by a collector to the trustees of the town. One of the trustees by deed released the action to the defendants and authorized a discontinuance. The court said: "We are of opinion that the release is without effect. These plaintiffs are mere trustees, and no one of them can release the action without an authority from the town, for whose benefit the bond was

taken. The attempt, by Horn, to discharge the action, is a fraud." In *Ford v. Jefferson County*, 4 Gr. (Ia.) 273, the bond was by the county treasurer and collector to the county commissioners. The collector was to account to the county for county revenue and to the state for state revenue. The county judge was empowered to settle accounts connected with the county revenue but he attempted to settle also the accounts connected with the state revenue and upon doing so canceled the bond. In an action on the bond on behalf of the state it was held that the cancelation was no defense because it was unauthorized. See also *McShane v. Howard Bank*, 20 Atl. (Md.) 776, an attempted release of a surety on a cashier's bond by the president of the corporation. In *Anderson v. Bellinger*, 6 So. (Ala.) 82, the sheriff after accepting and approving a bond to a plaintiff procured the signature of another surety. It was held that his act and that of the new surety were the acts of mere strangers and did not affect the validity of the bond. But in none of these cases was the officer who made the change, named as the obligee in the bond, except that in the New Hampshire case he was one of several obligees, but in that case there was no alteration of the instrument.

The cases, however, are not all in that direction even when the officer who made the change is not named as obligee. Perhaps the strongest case *contra* is that of *Dover v. Robinson*, 64 Me. 183. The penal sum in a collector's bond to a town was increased from \$2,500. to \$25,000. by writing the word "thousand" over the word "hundred." This was done by the principal with the consent of the selectmen of the town. The court held that whether the selectmen should be regarded as strangers or as representing the town sufficiently to bind it, the town itself had ratified their act by bringing suit upon the bond as altered (though there was a count on the original form also) and hence that no recovery could be had, but the court also expressed its views in clear and forcible language to the effect that, irrespective of ratification by the town, the alteration by the selectmen had destroyed the bond as an instrument of evidence and that

they as the financial agents of the town and custodians of the bond could defeat the rights of the town in that way and were not to be regarded as mere strangers. That case differs from this in its facts in two respects. There the action was brought on the bond in its altered form; here, in its original form. There an alteration was made in the body of the instrument itself; here, there was a new agreement in the margin. The court in that case recognized a difference between the mere unauthorized or illegal act of an officer and the vitiation of an instrument by him. In *Doane v. Eldridge*, 16 Gray 254, it was held that there must be judgment for the defendants on the ground that a material alteration had been made by the assessors in the body of a collector's bond without the latter's consent and that the suit had been brought on the bond as altered, but, though the court disclaimed expressing an opinion upon any other point, some of its language tends to indicate that the court thought that the alteration alone discharged the defendants from all liability, but it was also said that there could have been no recovery even if the bond had not been altered, for there had been no breach of its original condition. The assessors had changed the obligation of the principal, as they had a right to do.

Thus, there is much to be said in support of the view that the act of the assessor, though he was named as obligee, amounted to a mere spoliation, if it can be considered as a change in the instrument at all. But, however that may be, we are of the opinion that this can not be deemed a change in the instrument. There was no interlineation or erasure. The bond remained intact as it was originally. New matter was written in the margin. An addition in the margin may amount to an alteration, it is true, but it does not necessarily. If it is such as to appear to be a part of the original contract, it may amount to an alteration. But it may be in the margin and yet be an independent collateral agreement—as much so as if it were upon the back of the instrument or on a separate piece of paper. See *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77; *Church v. Fowle*, 142 Mass. 12. The writing in this instance was evidently, as appears on

the face of the bond, a subsequent independent collateral agreement. Not only is it in different ink from the rest of the writing, and signed separately, and by the obligee alone, but its very language shows that it was made subsequently and as a separate agreement, for it assumes that Blackstad had become bound and purports to be a statement of a permission for him to withdraw. It was at most an attempt to change the contract by a release of one of the sureties and not an attempt to tamper with or mutilate the instrument or to make the instrument itself express a different contract or obligation from that originally assented to. Whatever may have been the result if a material change had been made in the instrument by the assessor, he did not make such a change and did not have authority to release by an independent collateral agreement a surety on a bond held by him for the benefit of the Territory.

It is further contended that the trial court erred in admitting testimony of certain admissions made by Wright as to the shortage in his accounts. These admissions were of course competent evidence against Wright himself, but it is urged that they were inadmissible as against the sureties. It is well settled that admissions of the principal are admissible against the sureties if they are made during the term of office covered by the bond and in connection with his official duties, so that they are part of the *res gestae*, and some courts hold the admissions admissible even when they are made after the expiration of the term, provided the action is, as here, on a joint obligation and against both principal and sureties. (See *Atlas Bank v. Brownell*, 9 R. I. 168; *Amherst Bank v. Root*, 2 Met. 522; *Singer Mfg. Co. v. Reynolds*, 168 Mass. 588), though the contrary is held in a number of cases. The admissions now in question were objected to generally on the ground that the sureties were bound only by what the principal did and not by what he may have said he did, irrespective of whether the admissions were made during or after the term, but they appear to have been made several months after Wright had resigned. Assuming, however, that the objection was sufficiently specific and that the admissions

should have been rejected, the error was harmless, for not only was there ample other uncontradicted evidence to require the findings as to the fact and the amount of the shortage, but some of that evidence consisted of admissions, as to both the fact and the amount of the shortage, made by Wright before his resignation and in connection with his official duties, so that the admissions objected to were at most merely cumulative.

Finally it is contended that the shortage had been made good by the acceptance of the I. O. U.'s by the treasurer. The evidence does not show that the treasurer intended to accept the I. O. U.'s in full payment or satisfaction, even if he had authority to do so. It tends rather to show that he accepted them for purposes of collection and in so far as they might prove to be good. It was not error to find that their receipt by the treasurer did not relieve Wright and his sureties from further liability.

The judgment below is affirmed.

Smith & Lewis for plaintiffs in error.

M. F. Prosser, Assistant Attorney General, for defendant in error.

JOHN LUCAS *v.* THE AMERICAN-HAWAIIAN ENGINEERING AND CONSTRUCTION COMPANY, LIMITED, C. S. HOLLOWAY, Superintendent of Public Works of the Territory of Hawaii, and J. H. FISHER, Auditor of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED JULY 14, 1904.

DECIDED AUGUST 5, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

INJUNCTION AGAINST PUBLIC OFFICER—*scandal and impertinence in answer.*

Allegations in an answer setting up that the bill was brought to gratify private vengeance and not in the public interest, and that plaintiff had threatened the institution of this suit unless certain officers of defendant corporation should use their influence to cause the dismissal of another suit pending against the plaintiff, no unfair advantage having been shown to have been gained in consequence of the same, held properly stricken out on exceptions to answer.

Id—Id—*motives.*

The motives of a taxpayer in bringing such a suit held not to be the subject of inquiry.

Id—*taxpayer, right to sue.*

A tax payer may maintain a bill for an injunction against a public officer to restrain him from carrying out an illegal contract.

Id—*laches.*

A delay of two months after the award of a contract before bringing suit held not laches.

Id—*uncertainty in specifications.*

A contract for the construction of a wharf and other work, based on specifications which reserved to the Superintendent of Public Works the right to use in the new work any piles from the old

work considered suitable, held to constitute such an element of uncertainty as to render intelligent bidding and competition impossible, and the contract itself void.

OPINION OF THE COURT BY HATCH, J.

This is an appeal in equity from the First Circuit. The decree appealed from perpetually enjoins and restrains the defendant, the American-Hawaiian Engineering and Construction Company, Limited, from receiving any money under a contract for the construction of certain public work made between it, said defendant, and the defendant C. S. Holloway, Superintendent of Public Works of the Territory of Hawaii, as alleged in the bill; and enjoins said Superintendent of Public Works from signing or approving any vouchers for work done or materials furnished under said contract; and enjoins said defendant J. H. Fisher, Auditor of the Territory from issuing warrants or payments for work or labor done, or materials furnished under said contract. The contract was made on the 5th of March, 1904. It is therein provided that the American-Hawaiian Engineering and Construction Company, Limited, should "furnish all labor, material and removing existing structure and construct Brewer's Wharf and Shed, using new piles throughout the wharf and laying 1½" Bitumen in 4" of Concrete Foundation in accordance with plans No. 1290 on file in the Superintendent of Public Works office and specifications hereto annexed and forming a part hereof, and to complete the same on or before the 10th day of August, 1904," and the said defendant C. S. Holloway, as such Superintendent of Public Works, therein and thereby agreed to pay to the said defendant, American-Hawaiian Engineering and Construction Company, Limited, "the sum of Thirty Eight Thousand Seven Hundred (38700.00) (for Wharf and Shed and 28c. per sq. ft. for Bitumen and Concrete Foundation) Dollars in lawful money; payments to be made as follows: 75% of value of material used and work done each month and the balance when the whole work shall have been completed in accordance with the provisions of

this agreement, and shall have been accepted by the Superintendent of Public Works."

This contract was awarded in pursuance of a call for tenders made by the defendant C. S. Holloway, Superintendent of Public Works, on the 20th day of January, 1904, which was duly published in certain newspapers in Honolulu and is in the words and figures following, to wit:

"SEALED TENDERS.

"Sealed Tenders will be received until 12 M., of Saturday, February 20th, 1904, by the Superintendent of Public Works for furnishing all materials and remove existing structure and construct Brewer's Wharf and Shed.

"Plans and Specifications on file in the office of Engineer Department of Public Works. The Superintendent reserves the right to reject any and all bids. Proposals to be endorsed on envelope

" 'Proposal for Constructing Brewer's Wharf and Shed.'

"C. S. Holloway,

"Superintendent of Public Works.

"January 20, 1904."

The specifications referred to in the notice published, among other things, contained the following provisions:—

"WORK:

"The work to be done under these specifications consists in furnishing all material and labor. To remove existing structures and construct wharf and shed.

"REMOVAL OF OLD STRUCTURE:

"The contractor must remove old shed and wharf. The material to be the property of the contractor, except piles, mooring rings, cannon and mooring bits.

"The old material must be removed from the locality of the work as fast as it is removed, the locality of the work will not be permitted to be littered with the old material.

"The piles shall be carefully pulled and scraped clean of any marine growth and piled on bulkhead at end of slip between Brewer's and Nuuanu Wharves.

"The Department reserves the right to use, in the new structure, any of the old piles that may be suitable. The contractor must patch the coppering where necessary and extend same, if necessary. In pulling piles, care must be taken not to damage

copper. Any damage must be repaired by the contractor. Piles must be delivered to the Department of Public Works in good condition. * * *

"ALTERNATE BITUMEN PROPOSITION:

"The entire area of wharf and space under shed to be bitumenized with 2" of bitumen on top of wharf sheeting and concrete foundation as hereinbefore specified. On top of the sheeting shall be laid $\frac{1}{2}$ " x 2" strips spaced 2 feet apart. The bitumen used on surface of wharf must be hard bitumen disintegrated in closed kettles. The bitumen must be laid true to line and grade, and places that hold water must be removed and properly constructed. The surface of bitumen on wharf to be well brushed with cement grout."

Subsequently, on the 2nd day of February, 1904, said defendant, Holloway, as such Superintendent of Public Works, caused to be sent to certain prospective bidders for the work described in said advertisements, written notice in the words and figures following, to wit:

"Referring to the tenders for the construction of the Brewer's wharf and shed, would ask that you put in a bid for the bitumen floor as an extra, rather than making a total figure for the wharf and bitumen.

"Yours truly,

"J. H. Howland,

"Asst. Supt. of Public Works."

And on the 16th day of February, 1904, he caused a written notice to be mailed to certain prospective bidders for said work, which notice is substantially in the words and figures, following, to wit:

"Honolulu, T. of H., February 16, 1904.

"Messrs.:

"Inasmuch as the specifications for Brewer's wharf are rather indefinite as regards the number of piles which will be available from the old structure, would ask that you will figure on new piles, stating allowance per pile for those furnished by the Government. By adding this item to the specifications each bidder will be able to figure exactly the same amount of work.

"Very truly yours,

"J. H. Howland,

"Asst. Supt. of Public Works."

The bid of the American-Hawaiian Engineering and Construction Company was as follows:

"American-Hawaiian Engineering and Construction Company,
"Limited.

"508-509-510 Stangenwald Building,

"Honolulu, T. H., February 20, 1904.

"C. S. Holloway, Esq.,

"Supt. of Public Works.

"Dear Sir:—

"We herewith propose to furnish all material and perform all the work for the construction of Brewer's Wharf and Shed, in accordance with the plans and specifications, for the sum of Thirty Eight Thousand Seven Hundred Dollars (\$38,700.).

"We will lay the bitumen floor for the following sum additional:

"For 2" bitumen covering only, per sq. ft. \$.17

"For 2" bitumen covering with 4" concrete foundation
(including grading and rolling) per sq. ft.30

"For 1½" bitumen covering with 4" concrete foundation
(including grading and rolling) per sq. ft.25

"We herewith enclose certified check for Two Thousand Dollars (\$2,000.) to your order.

"Yours truly,

"American-Hawaiian Eng. & Con. Co., Ltd.

"Chas. H. Gilman,

"President."

On the 20th of February, 1904, at 12 noon, pursuant to the said advertisement, the said defendant, Holloway, as such Superintendent of Public Works, proceeded to open the sealed proposals received by him for doing said work and awarded the contract to said defendant, the American-Hawaiian Engineering and Construction Company.

On the 3rd day of May, 1904, the plaintiff, a citizen and taxpayer of the Territory brought this suit for an injunction against the defendants as above stated.

The plaintiff excepted to certain paragraphs of the answer of the American-Hawaiian Engineering and Construction Company on the ground of scandal and impertinence. The exception was allowed and the paragraphs complained of stricken out.

The portion of the answers stricken out averred that the suit was brought, and the process of the court used, for the purpose of gratifying private vengeance, and not to vindicate public interest; and that plaintiff had threatened to make trouble for defendant unless it used its influence to procure the dismissal of a suit brought by one Kendall against the plaintiff and the Superintendent of Public Works to restrain the execution of a contract made between them, and that petitioner threatened the president of the American-Hawaiian Engineering and Construction Company, Limited, with the institution of this suit unless he used his influence and caused the said Kendall suit to be dismissed. It is urged that the trial judge erred in allowing the exception to the answer. It was conceded by defendant on the argument that the weight of authority is that the motives of a taxpayer in bringing a suit can not be inquired into if he has shown that he has the other qualifications to sue. But it is contended that the offer was to show something more than motives; that the answer set up such acts on the part of the plaintiff as should deprive him of the right to sue in a court of equity. Equity will give no relief to a party who does not come into court with clean hands. In order to apply the rule, however, some fraudulent or dishonest practice must be shown; some attempted abuse of process; or some conduct evidently contrary to equity and good conscience. The acts set up in the portion of the answer excepted to hardly come within this category. It was not contended by the answer that in consequence of the alleged threats the plaintiff had gained any advantage over the defendants, or either of them, or that the situation or rights of the parties had been affected thereby. The threats used amounted, at most, to a threat to bring a suit which plaintiff was entitled to bring. Though the alleged conduct of plaintiff, if proved, would be open to criticism, we do not think the matters set up should deprive the plaintiff of the right to sue. Moreover, the plaintiff is suing in a representative capacity. As a taxpayer he is appearing on behalf of himself and of all other taxpayers; that is, on behalf of the public. He is volunteering

to act as a trustee on behalf of the public as far as this suit is concerned. There are numberless other available plaintiffs. His standing as a trustee, and his motives, are not matters of the first importance. What the court is chiefly concerned with under the pleadings, is the rights of the public in respect to the contract called in question, and whether there has been any breach of duty in awarding the same. That motives can not be inquired into is well settled. *Mazet v. Pittsburgh*, 137 Pa. St. 554; *Times Publishing Co. v. Everett*, 9 Wash. 519; *Brockman v. Vreston*, 79 Iowa 592. On the showing made we sustain the ruling allowing the exceptions to the answer.

It is next contended that the plaintiff has no right as a taxpayer to maintain this suit. The right of a taxpayer to bring suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction since the case of *Castle et al. v. Kapena*, 5 Haw. 27 (1883). If the question could be considered an open one we should follow the rule laid down in *Crampton v. Zabriske*, 101 U. S. 601, and in *R. P. R. R. Co. v. Hall*, 91 U. S. 343, cited in *Castle v. Kapena*. It is not necessary that the plaintiff should show actual damage to himself and to all others similarly situated, as is contended by the Assistant Attorney General. The cause of action is the alleged improper awarding of a contract, after a call for tenders based on indefinite specifications. If there has been a violation or evasion of the law requiring the awarding of the contract to the lowest bidder, after a public advertisement for tenders, damage is presumed to result to all taxpayers. The object of the suit is to prevent the violation of the law. The consequences which may result in case the law is disregarded are so obvious that no proof of actual pecuniary damage is necessary. In *Crampton v. Zabriske* the court on page 609 says: “* * * From the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong,

when the officers of the corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power." The plaintiff comes within the rule, and no further showing as to damages is necessary under the facts in this case.

The defendants next contend that the delay of the plaintiff in bringing these proceedings constitute laches. The contract was awarded on the 5th of March, 1904. Suit was brought on the 3rd day of May following. The contract was to be completed within five months from the date of the contract. Mere delay, short of the period of the statute of limitations, will not suffice to constitute laches if the parties have not changed their relative positions. *Daggers v. Van Dyck*, 37 N. J. Eq. 130. An important element in the matter of laches is the fact whether or not a defendant has been lulled into security by the inaction of the plaintiff and has done acts in respect to his property which he otherwise would not have done. *Gibbons v. Hoag*, 95 Ill. 45. The circumstances must have been such that it would be inequitable in consequence of change of conditions to permit plaintiff to assert his rights. *Calliher v. Cadwell*, 145 U. S. 368. The length of time which must elapse in order to show laches varies with the peculiar circumstances of each case and is not subject to any arbitrary rule. *Halstead v. Grinnan*, 152 U. S. 412.

We do not think that the delay in this case was sufficient to establish laches. It can hardly be said that facts existing on the date the suit was brought differed so much from those that existed from the time of awarding the contract that it would be inequitable to now consider on the merits the case made by the plaintiff. It is true the defendant The American-Hawaiian Engineering & Construction Company had ordered a large amount of material, most of which had arrived on the ground

before the suit was brought. This, however, must have been ordered very shortly after the awarding of the contract. It would be impossible to hold that the fact that materials had been ordered by a contractor who was acting under an invalid contract would prevent the court from inquiring into the validity of the contract without practically denying relief in all cases. And though under some circumstances the facts might warrant the court in holding the party estopped from bringing proceedings after only a short delay, still we do not think such a showing has been made in the present case.

The defense of laches was not set up in the answers and does not appear to have been urged before the trial judge. A very strong showing should be made in order to have the defense prevail in the appellate court for the first time. "The decision on the subject of laches is so much a question of discretion dependent upon the evidence that generally it will not be disturbed by an appellate court unless it is clearly against the evidence." *Muchison v. Payne*, 37 Tex. 305.

Whether or not the plaintiff has been guilty of laches in any particular case is a question very largely within the province of the trial court. *Merherin v. S. F. Produce Exchange*, 117 Cal. 159.

In view of the foregoing we hold that laches has not been established in the present case.

This brings us to a consideration of the merits. The first contention advanced by the plaintiff is that the original plans and specifications were too indefinite to be the basis for competitive bids. The uncertainty claimed arose from the right reserved by the department to use in the new structure any of the piles removed from the old structure. This right being reserved in the specifications was binding upon all intending bidders, and they were obliged to take it into consideration and make provision against its exercise. It is impossible, however, to see how any intending bidder could intelligently provide against the exercise of the right reserved. Instead of framing a bid for a definite quantity of material and definite work, the

bidder was faced by conditions purely speculative. The department did not undertake to say for what per centage of the new work old piles could be used. It did not commit itself to furnish, or permit the use of, any old piles. Yet the menace was always present that the most careful estimate of a bidder might be upset by directions to take and use old piles. The Assistant Superintendent of Public Works, Mr. Howland, testified that at the time the original plans and specifications were filed it was not known how many of the old piles, if any, would be available for use in the new structure, and that it was not positively ascertained that none were available until after they were pulled up and placed on the bulkhead, which was after the contract had been awarded. Bidders were thus left entirely in the dark as to what the conditions actually would be when the work was undertaken. The element of uncertainty was so great as to render definite and exact bidding impossible. This tended to prevent competition and to defeat the law requiring the call for tenders. It moreover opened the door to favoritism and fraud by making it possible for the Superintendent of Public Works to give definite assurances to a favored bidder as to the number of old piles which would be permitted to be used in the work; thus enabling him to under bid others who might consider it unsafe to bid on any other basis than that of new piles for the entire work, there being no certainty under the specifications that any old ones could be used. Many obvious abuses might follow such a course of conducting calls for bids, if it once became established as a precedent. It would be likely to defeat entirely the object of the law requiring the letting of public contracts only after a call for tenders. The facts in the present case do not warrant the slightest imputation against the Superintendent of Public Works. He acted in perfect good faith. The uncertainty in the specifications arose from a desire to save to the Territory the value of the old piles, if they had any, and to reduce the cost of the work in hand. In fact the disadvantage resulting from the uncertainty in the specifications occurred to him. This was the occasion for the letter to intending bidders,

requesting them to figure on new piles and to state an allowance per pile for those furnished by the government. No new advertisement was made, however. Prospective bidders remained in the dark as to whether the right reserved to require the use of old piles would be exercised, and there was the additional uncertainty as to whether the letter was a legal modification of the call for tenders. There was no uniformity of action on the part of bidders, and none was to be expected under the conditions as they then stood. Some bidders ignored the letter, as they had the right to, treating it as no part of the legal call for tenders. Others complied with the request. This shows there was no real competition. Genuine competition can only result when parties are bidding against each other for precisely the same thing and on precisely the same footing. The fact that the business is in such shape that divergent bids might be made, whether actually made or not, should be controlling in considering the validity of the transaction.

Section 10, Act 18, Laws of 1903 extra session, which the court below found was the law under which the contract was let, provides: "Every contract for constructing public works, or for furnishing material therefor, amounting to Five Hundred Dollars (\$500.00) or more, shall be awarded to the lowest bidder who shall furnish a sufficient bond, only upon public advertisement for tenders."

The object of all such statutory provisions is to prevent favoritism, corruption, extravagance and improvidence in the awarding of all public contracts. *People ex rel. Coughton v. Gleason*, 121 N. Y. 631.

A fair competition among the bidders is the prime object of such statutory provisions, and anything which tends to impair this is illegal. *Mazet v. Pittsburgh*, 137 Pa. St. 548. Such a provision requires such information to be put within the reach of bidders as will enable them to bid intelligently and will enable the official having charge of the proposed work to know whose bid is the lowest. The character of the work and the materials of which it shall be composed must be decided in advance.

Coggeshall v. Des Moines, 78 Iowa 235; *Kneeland v. Furlong*, 20 Wis. 460; *Boren v. Com's. of Drake Co.*, 21 Ohio St. 311; *Detroit v. Circuit Judge*, 79 Mich. 384.

In *California Improvement Co. v. Reynolds*, 55 Pac. R. 802, it was held that a contract for street paving at a certain price per square foot which reserved to the street superintendent the power to require a greater or less amount of certain material in the work, thereby affecting the profits on the work, is invalid, as discouraging competition in bidding. This case is very similar to the case at bar and illustrates clearly the vice of permitting any factor in the contract to be within the unqualified control of any official under whom the work is to be done. In the California case the specifications provided that "the rock to be used on the surface of the roadway shall be of such size as to pass through a one-inch mesh, a smaller percentage of fine material consequent upon the crushing of the rock being allowable, the amount of the same to be governed by the Superintendent of Streets." The court says: "Under this specification the superintendent was at liberty after the contract had been entered into to determine or vary the amount of fine material to be used, and it was therefore impossible for bidders to determine in advance the cost for doing the work, and competition in bidding was therefore restrained, and after the contract had been awarded the owners were unable to determine whether it would be to their advantage to elect to take the contract."

Statutory provisions prescribing the mode and time of advertising for bids are mandatory, and must be strictly construed. *McCloud v. Columbus*, 54 Ohio St. 439.

The letters from the office of the Superintendent of Public Works, dated respectively Feb. 2nd, 1904, and Feb. 16, 1904, did not eliminate the uncertainty in the specifications. The specifications could not be legally amended without new advertisement, which was not had.

Holding as we do that the proceedings in regard to the placing of this contract were fatally defective and that a valid contract could not be based upon the faulty specifications for the reasons.

given, it becomes unnecessary to discuss the other propositions advanced by counsel for the complainant.

The decree appealed from is affirmed.

Kinney, McClanahan & Cooper for plaintiff.

M. F. Prosser, Assistant Attorney General, for defendants Holloway and Fisher.

Castle & Withington for defendant American-Hawaiian Engineering & Construction Co., Limited.

HENRY E. COOPER *v.* ISLAND REALTY COMPANY,
LIMITED, and JOSEPH A. GILMAN.

APPEAL FROM GEAR, CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED AUGUST 3, 1904.

DECIDED AUGUST 16, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

COVENANT AGAINST ENCUMBRANCES—*taxes*.

"A" sold to "B" on May 11, 1900, certain land, with covenants against encumbrances. Taxes for the year, which were assessed on January 1 against the grantor, became due on September 1. The taxes were paid by the grantee. The tax did not become a lien until September 1. Held that there was a breach of covenant, the lien owing its existence to facts existing on the 1st of January.

MORTGAGE—*payment of taxes by mortgagor*.

To obtain the right to charge any portion of taxes against a mortgagee, a mortgagor paying taxes must make the return directed by the second paragraph of section 831 of the Civil Laws.

PAROL AGREEMENT.

An alleged contemporaneous parol agreement set up in this case is held not to have been shown to have been the act of the parties.

MORTGAGE—foreclosure for default in payment of interest—absence of stipulation maturing debt.

A mortgage may be foreclosed for default in payment of interest. Upon such foreclosure, even in the case of the absence of a stipulation that the entire debt shall at once mature, the mortgagee may collect the whole debt, principal as well as interest, from the proceeds of sale. *Howell v. Western Railroad Co.*, 94 U. S. 463, followed.

Do—foreclosure sale—in lots or as a whole.

It is within the discretion of the court based upon the showing made by the evidence to decree a sale of the mortgaged land in lots, or as a whole.

FORECLOSURE—decree should allow redemption up to date of sale.

A decree of foreclosure should allow redemption of the default, and a payment of the sum in arrears, at any time up to the date of the foreclosure sale.

FORECLOSURE SALE—for cash only.

A foreclosure sale should not be authorized on credit.

Do—counsel fee.

Counsel fees in foreclosure suits can not be allowed unless stipulated for in the mortgage.

Do—plaintiff a bidder.

A plaintiff in a foreclosure suit should be allowed to be a bidder at the foreclosure sale.

OPINION OF THE COURT BY HATCH, J.

This is an appeal from a decree of foreclosure and sale of a mortgage given by the Island Realty Company, Limited, to the plaintiff. The mortgage is dated the 11th day of May, 1900, and is for the sum of \$70,000, the same being a part of the purchase price of certain tracts of land situated in Manoa, Oahu, conveyed by the plaintiff to said mortgagor by deed of the same date. The note, to secure which the mortgage was given, was made payable on or before the 11th day of May, 1905, with interest at six per cent. per annum. The mortgage contains agreements by virtue of which the mortgagor was authorized to sell portions of the mortgaged premises for cash and upon credit, accounting to the mortgagee for three-quarters of the sums received for the same; the mortgagee agreeing that on receipt

of three-quarters of the purchase price of the lots sold he would release the same from the operation of the mortgage.

The provision in the mortgage in regard to foreclosure is as follows: "Upon any failure by the mortgagor to pay the said sum hereby secured, or the interest thereon, or to otherwise comply with its agreements herein contained, the mortgagor shall have the right to foreclose this mortgage by mortgage foreclosure suit in any court having jurisdiction thereof."

The decree found that the allegation in the bill in regard to default in the payment of interest was supported by the proof, and further found that there is due to the plaintiff on said mortgage the sum of \$69,754.40. It was also found that the defendant J. A. Gilman was the holder of a second mortgage on said premises on which is due the sum of \$21,722.03. Under the decree a commissioner was appointed to conduct a foreclosure sale of the mortgaged premises. The defendants appeal.

It is contended first, by the defendant, the Island Realty Company, Limited, that the trial judge erred in not deducting from the amount found to be due the plaintiff the sum of \$1,000, the amount of taxes for the year 1900, which was paid by said defendant on the 14th day of November, 1900. The tax was returned and the assessment made against the plaintiff as of January 1, 1900. The conveyance was made on May 11, 1900, and the tax became a lien upon the premises on the 1st day of September, 1900. The appellant claims that the deduction should have been made on two grounds; first, "that the failure to pay was a breach of the covenant in the deed, that the premises described therein were at the date of said deed "free, clear and discharged, unencumbered of and from all former grants, titles, charges, estates, judgments, liens, taxes, assessments and encumbrances of what nature or kind soever." Second, "that the tax was the debt of the plaintiff which the defendant paid in order to remove an encumbrance on its land, and therefore paid for a reasonable cause and not officiously or voluntarily."

The principle involved in the first of the above contentions is fully supported by *Jones v. Norris*, 8 Haw. 71. In that case

it was held that the work of the assessor relates to the first of July and the charge is fixed on that day whatever may be the subsequent date when the assessor makes up the assessment of individuals and completes the entire district. Since that decision the date of assessment has been thrown back from July first to January first, and the tax has been made an express lien upon real estate from September first. The enactment of the provision that the lien shall attach on the first day of September in each assessment year and shall continue for two years does not imply that a change of ownership between January first and September first would defeat the lien; neither does it imply that the owner on January first, against whom the assessment is made, becomes relieved of personal liability on September first. The foundation facts on which the lien is built must exist prior to September first. The language of the covenant in the present case comprehends not only liens, but assessments. An assessment was outstanding against the land on the date of the sale to defendant company. We do not desire, however, to base our decision on any mere question of wording. In our view the covenant against encumbrances is broken if at the time it was made an assessment for taxation had been made against the estate, notwithstanding the provision of the statute that the lien attaches on September first. The authorities are diametrically opposed on this subject. We consider, however, that the rule in *Jones v. Norris* should be followed. This is also clearly the law in Massachusetts.

In *Cochran v. Guild*, 106 Mass. 29, it was held that taxes on land are an encumbrance thereon from the date of their assessment. By statute of Massachusetts the tax is made a lien upon land on the date the tax list is committed to the collector. The court by Chapman, C.J., says: "On May 1, 1868, when the taxes were assessed, the land became liable for their payment. It is true that payment was not to be made till the tax bills should be made out and put into the hands of the collector, and all the necessary preliminary steps should be taken on his part. It is also true that they might be collected otherwise than by a

sale of the land, and thus its liability might terminate, or it might cease by lapse of time. But they have not been paid otherwise, and the purchaser has been compelled to pay them. He was obliged to pay them in order to relieve the land from a liability to which it was subject when he took his conveyance with the covenant against incumbrances. These taxes had all the characteristics of an incumbrance. What constituted the incumbrance was the present paramount right of the city to hold the land subject to the payment of the taxes already assessed, if they should not be paid otherwise." "Taxes are assessed as of the first day of May in each year; and, on real estate, 'to the person who is either the owner or in possession thereof on the first day of May.' Gen. Sts. C. 11, §8. They 'constitute a lien thereon for two years after they are committed to the collector.' Gen. Sts., C. 12, §22. To be effectual, this lien must relate back to the first day of May. Such, doubtless, was the intent, and should be the construction of this provision of law; although practically the tax is not assessed until some weeks or perhaps months later." *Hill v. Bacon*, 110 Mass. 387-388. "Upon this question, the construction to be given to the statute must be such as accords with the interpretation given by this court to similar provisions relating to the collection of taxes. By the Gen. Sts., C. 12, §22, taxes assessed on real estate are declared to be a lien thereon for two years after they are committed to the collector; and yet, in *Cochran v. Guild*, 106 Mass. 29, in answer to the objection that they were not an incumbrance until so committed, it was held that they were so from the first of May, the date of their assessment, because the land then became liable for their payment." *Carr v. Dooley*, 119 Mass. 295.

The appellant also claims that the trial judge erred in not deducting or allowing to it the payment of taxes on the mortgage made by it October 21, 1901, and similar taxes paid by it on the 8th day of January, 1904, together with a penalty of \$130. It may be said in passing that in no event can the amount of the penalty be allowed. The obligation was upon the defendant company to pay the taxes in the first instance. The penalty

accrued through its default in doing this. The claim for the allowance of these amounts is based upon Sec. 831, Civil Laws, which is as follows:

"The mortgagor of any property shall, in respect of such property, be liable to taxation only on the difference between the whole value of the property mortgaged and the amount of money owing on the mortgage of the property.

"Provided always, that the mortgagor shall append to the statement of the property belonging to him and required by this Act a statement of the date of the mortgage and of the amount secured thereby, and the names of the respective mortgagees.

"In respect of the amount of money secured by such mortgage he shall pay the tax thereon, which payment shall be deemed to be a payment made by the mortgagor to the mortgagee on account of interest, or of principal and interest, as the case may be, and all moneys so paid by a mortgagor shall be allowed for in the account between the mortgagor and mortgagee."

The question is as to the proper construction of this statute. The defendant company claims that a proper reading of the statute gives it the absolute right to treat this payment of taxes on the amount secured by the mortgage as a payment of interest, regardless of whether it filed a statement of the date of the mortgage and of the amount secured thereby and the names of the respective mortgagees as provided in the Act. On the other hand, the plaintiff claims that unless the requirements contained in the proviso as to the filing of such statement are complied with, the mortgagor has no right to recover the amount of such tax from the mortgagee. It is admitted that the defendant company, as to the period covering the items in dispute, did not file any statement with the tax assessor as to the mortgage.

In the absence of special statutory provisions, the mortgagor in possession would ordinarily be held liable for the payment of all taxes upon mortgaged property. The general rule, therefore, requires the mortgagor or his grantee to pay the taxes on mortgaged premises. *Ralston v. Hughes*, 13 Ill. 470; *Medley v. Elliott*, 62 Ill. 532.

The construction contended for by the defendant company

leads to a disregarding of the proviso contained in said act. Has the court the authority to disregard this proviso? Realizing the difficulty of this, the defendant concentrates its attack upon the proviso in question. It is contended that the word "provided" does not necessarily impose a condition; citing *Chafin v. Harris*, 8 Allen 596. Cases are cited showing the application of a restricted construction to a proviso; and it is claimed that the proviso in question is in fact an independent enactment, directory only in its nature, and not controlling the other operations of the statute above set out; and that at most it qualifies only the paragraph or clause immediately preceding it. Granting that the word "provided" does not necessarily impose a condition, it may do so, and it clearly does in this instance. The effect of a proviso is thus stated in *Voorhees v. Bank of the U. S.*, 10 Pet. 449. In that case certain acts required to be done previous to a sale were prescribed by proviso and were held to be conditions precedent, it being stated by Mr. Justice Baldwin that "the effect of a proviso in deeds and laws is to declare that the grant made shall not operate, or the authority shall not be exercised, unless in the case provided."

In *Minis v. U. S.*, 15 Pet. 423, Judge Story says: "The office of a proviso generally is either to except something from the enacting clause or to qualify or restrain its generalities or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

In *Austin v. U. S.*, 155 U. S., at p. 431, the court says: "While we consider that the law does not attach a fixed and invariable meaning to a proviso, we think it clear that this proviso negated the authority granted beyond the limit defined. It operated upon the entire enacting clause, and made loyalty a jurisdictional fact, since the consent to the prosecution of the suit was given upon the condition that that fact should be established."

The appellant company is forced to rely upon the above act in order to claim any recovery against the plaintiff. By said

act a new authority was conferred upon it. This authority could only be exercised upon proof of a compliance with the terms set out in the act. The qualification contained in the act is controlling as clearly as was the proviso in *Austin v. United States*. The object which the legislature had in view in requiring the statement mentioned in the proviso, or whether or not the filing of such a statement serves any useful purpose, is not a matter of controlling importance. What is plain, however, is the fact that the law in order to give a mortgagor the benefit of its provisions, requires certain acts to be done by him. The court has no option in the premises. It can not disregard the plain words of the law on the pretext of giving to it a "sensible construction," or one that will occasion no inconvenience, or that will not cause the doing of a "vain thing." Granting that the legislature will not be presumed to require the doing of a "vain thing," the presumption is still stronger that the legislature intends every clause of a statute to have some effect; and that the construction of such statute, if possible, must be such that the whole will stand. *San Diego v. Grannis*, 77 Cal. 511; *Browne v. Turner*, 174 Mass. 150.

"All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another but sustain and support it." *Bernier v. Bernier*, 147 U. S. 242.

To give the act in question such a construction as is defined in *Bernier v. Bernier*, and at the same time a consistent and harmonious one, it is necessary to construe the words beginning with "provided always" as a condition; and to hold that the condition qualifies the entire section, that which follows, as well as that which precedes, the proviso. The language of the third paragraph closely couples up this paragraph with what precedes. The opening words are "in respect of the amount of money secured by such mortgage," etc. By "such mortgage" is meant a mortgage which has been returned and named in an appended statement as required by the proviso immediately preceding.

It is not a universal rule that a proviso applies only to the paragraph or clause immediately preceding it.

"A statute should be so construed as to give some effect and operation to each word or phrase, and all relating to the same subject matter should be construed together. Though the proviso is found in a section and immediately follows a particular phrase, its effect is not necessarily limited and restricted to the same section. * * * When from the context, and a comparison of all the provisions relating to the same subject matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection." *Wartensleben v. Haithcock*, 1 So. 38, 40.

See also *Smith v. Hamakua Mill Co.*, 15 Haw. 648, where a proviso in regard to inheritance by kindred of the half blood is extended by construction throughout the whole law of descent.

The defendant company has failed to comply with the requirements of this statute, and can not be allowed the deduction claimed. This view of the matter renders any consideration of the question of voluntary payment unnecessary.

The plaintiff further claims that the trial court erred in excluding the testimony offered by plaintiff of a contemporaneous parol contract between the parties, by which the mortgagor agreed to pay all taxes. This contention is also in our opinion without merit. The testimony offered upon this subject was properly ruled out. The general rule is expressed in the late case of *Union Selling Co. v. Jones*, 128 Fed. 672, as follows: "Where a contract has been reduced to writing, and imports on its face to be a complete expression of the whole agreement, it will be presumed that the parties have introduced into it every material item and term; and hence parol evidence is inadmissible to add another term to the agreement, though the writing contains nothing on the particular point to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks; and the legal import can no more be varied by parol than can what is written." This rule is subject to possible qualification,

as in *Carr v. Dooley*, 119 Mass. 295, upon an offer to prove an independent agreement with reference to a distinct and separate matter, though founded upon a consideration embraced in the price of the land. It would, however, be incumbent upon the plaintiff to show an agreement on the part of the defendant corporation, the Island Realty Company, Ltd., to assume the burden of the taxes. This the evidence entirely fails to do.

The appellant corporation next contends that the decree is clearly wrong in accelerating the maturity of the debt, and it claims that "where there is no stipulation maturing the entire debt, on default of the payment of interest, foreclosure can only be had for the interest due;" and also that "where there is no clause accelerating the maturity of the debt, the court can not engraft one on the contract; and even where one exists its provisions must be strictly followed;" and also that "there is no right to foreclose for non-payment of interest save for the interest." We are referred in support of these three propositions to the following authorities: *Encyclopedia Pleading and Practice*, Vol. 9, p. 240; *McFadden v. Mayes Landing Co.*, 49 N. J. Eq. 176; *Wiltsie on Mortgage Foreclosures*, Sec. 42; *Bank of S. L. Obispo v. Johnson*, 53 Cal. 99.

The New Jersey case, *McFadden v. Mayes Landing Co.*, fully supports the proposition and the law is undoubtedly settled in that state, as the appellant corporation contends. In California the law has also been held the same way in *Bank of S. L. Obispo v. Johnson*, though by a divided court. In Vol. 9, *Ency. Pl. and Pr.*, at p. 240, the proposition is laid down as defendant appellant contends. *Wiltsie on Mortgage Foreclosures*, however, in the latter part of the paragraph cited by defendant appellant, to wit, paragraph 42, says: "The better doctrine seems to be that the interest falling due yearly or at other stated periods, on a note secured by mortgage, is an installment of debt, and that the mortgage may be foreclosed to enforce its payment, because the mortgage must have been given to secure the interest as well as the principal, and the law will not withhold a remedy until the period elapses for the maturity of the whole debt."

Morgenstern v. Klees, 30 Ill. 422, is cited in support of this view and correctly cited.

The cases cited, however, in Vol. 9, Ency. Pl. and Pr., except from New Jersey and California, do not very clearly support the text. In Indiana the matter is regulated by statute; and of the remaining cases the following are not inconsistent with the opposite view.

Dederick v. Barber, 44 Mich. 19, holds "Where a debt is made payable after several years, but the interest is payable annually, a bill to foreclose the mortgage which secures the debt may be properly filed after the expiration of the year, if interest is in arrears."

Scheive v. Kennedy, 64 Wis. 564, holds "A mortgage may be foreclosed for breach of condition thereof by failure to pay interest on the debt secured, although the mortgage itself does not provide for such foreclosure."

Hunt v. Harding, 11 Ind. 245, holds "Where a mortgage is executed to secure the payment, when due, of several promissory notes, falling due at different times, it may be foreclosed upon default of payment of the note first due."

Gladwyn v. Hitchman, 2 Vern. 135, holds "A mortgage is forfeited by non-payment of interest."

In *West Branch Bank v. Chester*, 11 Pa. St. 282, the court goes into a historical review of the subject. On page 290 the court says: "In England a default in payment of half a year's interest on the appointed day is a sufficient breach of condition to enable the mortgagee to foreclose. Coote on Mortgages, 518; and see *Gladwyn v. Hitchman*, 2 Ver. 135. With us, the remedy is so modified that we can not foreclose for such a breach of condition, nor until a year after the whole mortgage debt becomes due; but the non-payment of interest where it is expressly stipulated for, is no less a breach of condition here than in England; or than the non-payment of an installment of the principal. In a word, the interest is part of the subject of the mortgage debt. It belongs not to it by tacking, it is not an incident of the debt, but *pro tanto*, it is the debt itself. The

parties anticipated it at a fixed rate of increase and it was just as sure to accrue as time was to last, and they put it in the mortgage as part and parcel of the debt which it was the office of the mortgage to secure. There it remains, and a judgment at law for it must have the same effect as a judgment for any other part of the mortgage debt. There is no room for a distinction between a judgment for the interest and a judgment for an installment of the principal. Both are judgments for part of the mortgage debt. A distinction here would be arbitrary and without a difference; but on a judgment for an installment of the principal a virtual foreclosure of the mortgage is effected by a sheriff's sale as we have seen—the equity of redemption in the mortgagor is extinguished and the legal estate still in him is transferred—and the lien of the mortgage is divested. It follows as a necessary conclusion that the same consequence must attend a sheriff's sale of the mortgaged premises made upon a judgment obtained for the interest.”

On consideration of all the foregoing cases we are of opinion that Wiltsie's statement is correct, namely, that the better doctrine seems to be that a mortgage may be foreclosed in consequence of default of payment of interest. In this jurisdiction we have never had such legislation as was adopted in Pennsylvania, as stated in *West Branch Bank v. Chester*. Our constitutional development, when Hawaii was independent, was on rather different lines from those followed in California. We have adopted the common law of England as the basis of our jurisprudence, which of course includes the fundamental doctrines of the English court of chancery. When, therefore, we find an authoritative statement of what the common law is, we ought to follow it, unless the question is controlled by local usage or the decisions of this court. There is no reason why the language of the mortgage sued upon should be given other than its natural construction. It provides for foreclosure on the happening of either of three contingencies: (a) the failure to pay the sum secured by the mortgage, (b) a failure to pay the interest thereon, (c) a failure to otherwise comply with the agreements

contained in the mortgage. If the construction contended for by the appellant is correct, no remedy at all would be possible in the case of the third contingency, to wit, failure to comply with the agreements contained in the mortgage. Such construction should be adopted as would give effect to each one of the three provisions set out in the mortgage, if possible.

The case of *Howell v. Western Railroad Co.*, 94 U. S. 463, is conclusive upon the question of the right of the plaintiff to a sale of the entire property. This was a case for the foreclosure of a mortgage to secure bonds, default having been made in the payment of interest. The court held that a stipulation printed on the bond that the same should mature in six months after default in the payment of any interest coupon was void in consequence of the terms of the statute under which these bonds were issued. The court then held: "The company, therefore, had a right to mortgage their property for the payment of these installments of interest as well as principal, and to make it one of the provisions of the mortgage, that it might be foreclosed if these installments were not paid as they fell due. There can, in fact, be but one decree of foreclosure of the same mortgage on the same property, and it is a necessity of that foreclosure, under the principles of the court of chancery, that all the sums secured by that mortgage must be protected according to their priority of lien. We are of opinion, then, that there is due from the railroad company to plaintiff the amount of his overdue and unpaid coupons. For this sum, whatever it may be, he has a right to a decree *nisi*, according to the chancery practice,—a decree which will ascertain the sum so due, and give the company a reasonable time to pay it, say ninety days or six months, or until the next term of the court, in the discretion of that court. If this sum is not paid, the court must then order a sale of the mortgaged property, with a foreclosure of all rights subordinate to the mortgage, with directions to bring the purchase money into court. If the case proceeds thus far, the plaintiff will have a lien on the money thus paid into court, not only for his overdue coupons, but

for his principal debt, and it must be provided for in the order distributing the proceeds of the sale."

It is contended by appellant that the mortgaged premises should be sold in lots and not as a whole. Plaintiff claims, however, that such a sale would be detrimental, and that the property would bring less in lots than as a whole. We think the showing made by plaintiff supports this view. The property was sold by plaintiff as a whole. It had been used by him as a whole. He should not be now exposed to the danger of having one or two lots sold out of the middle of the estate, and then being obliged to bid in the remainder. The detriment of having the estate cut up by having small lots sold out of it might be very great. In this case the land was subdivided in small lots by the mortgagor after the date of the mortgage. This does not entitle him to demand a sale in lots according to his map. Wiltsie, Mortgage Foreclosures, Sec. 492. Under the circumstances of this case we think the plaintiff is entitled to a sale of the estate as a whole.

The decree should be amended by a provision allowing redemption by the payment of the amount of interest in arrears and costs at any time before sale. *Jugers v. Cotton*, 13 Wis. 374. Upon payment of interest due and costs the foreclosure proceedings would then abate.

The decree properly provides for a cash sale. Judicial sales should not be made on credit unless by consent of the parties. Wiltsie, Mortgage Foreclosures, Sec. 482. The provisions in the mortgage for sales on credit by the mortgagor have no bearing at all upon the question of a foreclosure sale by the court. As is pointed out in *Scheibe v. Kennedy*, 64 Wis. on p. 568, in order to give a court of equity the right to maintain an action to foreclose a mortgage it is not necessary that the mortgage should provide for such foreclosure. The jurisdiction does not depend on contract. The contract between the parties as to sale of lots prior to default is a matter entirely apart from the question of jurisdiction and of authority to be exercised by the court by virtue of its inherent power.

The counsel fee awarded should be disallowed. In the absence of a stipulation in the mortgage for the payment of counsel fees, a suit for foreclosure stands on the same footing as any other suit in equity; only the ordinary costs can be taxed. *Birb v. Hall*, 107 Cal. 160.

The plaintiff should be authorized to become a purchaser at the sale, and costs should be allowed him.

The suit is remanded to the circuit judge for modification of the decree entered, and further proceedings in accordance with the views herein expressed.

Kinney, McClanahan & Cooper for plaintiff.

Castle & Withington for defendants.

H. W. JOSEPH, MICHAEL AND MORRIS HYMAN AND
I. RUBINSTEIN, doing business as co-partners under the
firm name of HYMAN BROS., v. SING WARN, defend-
ant, and W. A. WHITING, garnishee.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED AUGUST 11, 1904.

DECIDED AUGUST 16, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

GARNISHEE PROCESS.

A certificate of award on "claim of T. P. for S. W." is not the subject of garnishment in the hands of the attorney of S. W. in an action at law against S. W. The certificate if regarded as a judgment cannot be garnished as effects of the defendant, there being no statute providing for its sale on execution, and the common law not allowing a judgment to be levied and sold on execution. As a mere notice certifying to the award, its purchaser at an execution sale would acquire no right to the award.

STATEMENT OF CASE.

The principal question presented by the plaintiffs' bill of exceptions is whether a certificate of award of the Fire Claims Commission is the subject of garnishment. The certificate reads as follows:

"Bill and Certificate of Award.

"Honolulu, June 17, 1902.

"Territory of Hawaii,

"Fire Claims Commission.

"Claim of Tam Pong.

"for

"Sing Warn.

"Special Appropriation: FIRE CLAIMS COMMISSION—AWARDS.

"As Provided by Act 15, Session Laws 1901.

CLAIM.	AMOUNT AWARDED.	
"To damages for loss of property destroyed by orders of the BOARD OF HEALTH, or in consequence thereof in connection with the suppression of Bubonic Plague, A. D. 1899 and 1900	\$2,072	

JUDGMENT AWARD NO. 5511.

"It is hereby certified that the above amount is the correct
AWARD as per Record of Judgments.

"By order of the FIRE CLAIMS COMMISSION:

"J. M. Riggs, Clerk."

The plaintiffs obtained judgment against the defendant Sing Warn mentioned in the foregoing certificate. The plaintiffs' counsel were not allowed to ask the garnishee the question "Do you know what this claim of Sing Warn's was for?" nor the question, "State whether or not Tam Pong obtained an award from the Fire Claims Commission in his own right?" The court sustained the defendant's objection to each of these objections on the ground that they were immaterial and irrelevant, to which ruling the plaintiffs excepted. The plaintiffs also

excepted to the ruling of the court that the garnishee had no money or property in his possession belonging to the defendant and therefore discharged the garnishee.

Robertson & Wilder for plaintiffs: The certificate is the property of Sing Warn. Tam Pong is described neither as her trustee nor agent. No one but Sing Warn can collect upon it at the disbursing bank. If this did not appear sufficiently on the face of the certificate we were entitled to show it by evidence *aliunde*. The statute providing for attachment of the "goods and effects" of a debtor cover every species of personal property; such as United States Government voucher. *Leighton v. Heagerty*, 21 Minn. 42. A promissory note, after maturity. *Somers v. Losey*, 48 Mich. 294. An order on a county treasurer. *Elser v. Rommel*, 98 Mich. 74. A draft. *Storm v. Cotzhhauser*, 38 Wis. 139; *Bank v. Wilson*, 74 Wis. 391. The reasoning that only property subject to execution at common law is covered by the ordinary garnishment statute, is unsatisfactory and unsound. The statute is remedial and should be liberally interpreted so as to include everything within the mischief sought to be remedied. For purposes of garnishment, every species of property should be held to satisfy the just claims of honest creditors. Sutherland, Stat. Con., Secs. 346, 348.

T. McCants Stewart for defendant: It is immaterial what the claim was for if the certificate belonged to the defendant. If it did not belong to her there could not be any further inquiry about it. The garnishee process is legal and not equitable in its nature. 14 Am. & Eng. Enc. Law, 761. The garnishee must be liable in an action at law brought against him by the defendant. *Webster v. Steele*, 75 Ill. 544; *Getchell v. Chase*, 37 N. H. 109; *Cheaply v. Brewer*, 7 Mass. 261. Defendant could not bring replevin against the garnishee for this certificate; Tam Pong would have to receipt for the money payable under it, and on its face he is shown to be the principal party interested in it. In *Ah Sue v. Chu Kee*, 6 Haw. 623, the garnishee was discharged on the ground of no privity between him and defendant. In *Hackfeld v. Lee Loy*, 4 Haw. 487, it was held that there must

be unincumbered cash on hand, or the garnishee is entitled to his discharge. This principle requires that the garnishee should hold property involving no legal or equitable claim by third parties.

OPINION OF THE COURT BY HARTWELL, J.

The claim which was adjudicated by the fire claims commission was that of the defendant Sing Warn, and not of Tam Pong, and the award which was made by the commission is in favor of Sing Warn, for whom Tam Pong presented the claim, which was represented before the commission by her attorney, W. A. Whiting, as shown by the testimony in this case.

The certificate is claimed by the plaintiffs to be subject to garnishment, not as a debt but as "effects." If the debt of which the certificate may be deemed to be evidence were intended to be garnished, there would be the difficulty that no statute authorizes the issuing of a garnishee process against the Territory, unless in claims against government beneficiaries. *Morse v. Robertson*, 9 Haw. 196.

If a judgment can be levied upon and sold on execution, there is no reason why the plaintiffs should not now take out execution on the judgment certified by this certificate.

It is equally true, that if this certificate is to be treated as in the nature of a judgment, and also is to be classed as "effects" within the meaning of the statute upon garnishment, the plaintiffs are entitled in taking out execution against the defendant, to direct the officer serving the same to demand the certificate of Mr. Whiting, the attorney whose duty it would be to expose the same to be taken on execution. Sec. 1711, C. L. The statute concerning executions requires that

"Every levy by an officer, in pursuance of a writ of execution issued by any court or justice, shall be made by taking the property levied upon into his possession, care and guardianship, and in his option, by removal of the same to some place of security. The officer shall make an inventory of the property levied upon." Sec. 1470, C. L.

After advertising and selling to the highest bidder,

"The officer shall execute and deliver, to any purchaser at any such sale, such certificate or purchase, or conveyance, as may be necessary." Sec. 1474, C. L.

If the certificate is to be regarded as in the nature of a judgment, a counterpart of which is on the records of the fire claims commission, it can not be garnished as "effects" of the defendant, for there is no statute providing for the sale on execution of a judgment. At common law a judgment can not be levied upon and sold on execution. There would be no use in garnishing that which can not be disposed of according to law, for the benefit of the plaintiff.

If on the other hand the certificate is not itself a judgment, but is a mere notice certifying that an award of \$2,072 has been made in favor of the claim of Sing Warn, its purchaser at a sale on execution would acquire no right to the money awarded, and no authority to demand and collect it, or enforce its payment to himself.

As the plaintiffs, having now obtained judgment against the defendant would, if the law permitted them to do so, proceed to levy execution on the award upon the order discharging the garnishee being confirmed, we will state the reasons why the law does not authorize a judgment to be levied upon, the same reasons applying to its garnishment as property or effects.

"The mode of levying upon a judgment, and of applying it towards the satisfaction of the writ, is a matter of some difficulty. That it is property is everywhere conceded. But though it is evidenced by some writing or matter of record, such writing or record is not the judgment, but only evidence thereof. It would be impossible to seize the judgment, for it is intangible, and it is improper to seize the evidence of it, for that should remain in the custody of some public officer. In this dilemma, the major portion of the courts considering the question have concluded that a judgment can not be levied upon nor sold, and can be subjected to garnishment only." *Freeman on Executions*, 3 Ed., p. 433.

"The statute manifestly contemplates a power in the garnishee to withhold the payment of the debt from his creditor upon

being served with the attachment, and a power of defending himself against the claim of his creditor after payment under the attachment. It never could have been designed to subject him to the liability of twice paying the debt, or to deprive him, after paying the debt under the attachment, of a legal defence to the claim of his creditor. The whole design of the statute, in this respect, is to place the attaching creditors in the place of the original creditors of the garnishee. And hence the attachment is a good plea to an action for the recovery of the debt. But if the debt be attached after judgment, what protection has the garnishee against the judgment or the claim of the attaching creditor? His property is liable to immediate seizure and sale under the execution upon the judgment, while, at the same time, he is made liable for the amount of the judgment to the attaching creditor. If it be said that the court will exercise its controlling power to prevent such injustice, the answer is, that even when the judgment is in one of the courts of this state, the levy and sale may be made at a time when the court can not exercise its controlling power. And when the judgment is recovered in another state, we have no ground for assuming that the court will stay the execution of its process on account of an attachment issued here." *Shinn v. Zimmerman*, 23 N. J. L. 152.

There is no doubt that debts may be garnished by a service of summons upon the debtor. We think that this is the only mode authorized by our statute. A similar statute in Minnesota received the same construction.

"We do not interpret this statute as prescribing two different and dissimilar methods of effecting such a garnishment, either one of which may be pursued at pleasure. It does not provide that garnishment of a mere debt may be made *either* by proceedings against the debtor and service of summons upon him, or by like proceedings against and service upon the creditor or his assignee, or any trustee to whom the creditor may have assumed to transfer his title. * * * *

"It is true, the general term 'property' may often embrace mere debts and choses in action. Whether, in a particular statute, it is to be construed as having that broad meaning, or a more limited one, must be determined by the aid of the familiar rules relating to statutory construction. The word 'effects,' defining things which are subject to garnishment by service upon the person having such 'effects' in his possession or under his control, is made by the statute to include bill of exchange, promis-

sory notes, drafts, bonds, certificates of deposit, bank notes, contracts for the payment of money, and other written evidence of indebtedness in the hands of the garnishee at the time of service upon him. It may be conceded that a garnishment of such 'effects' would reach all of the material objects above named which might be in the possession of the garnishee. But it will be observed that the things here defined to be 'effects' are all things of a material nature; and intangible legal obligations—debts—are not mentioned, while they *are* clearly designated in the prior sections as subjected to garnishment by service upon the debtor. It may be assumed, too, that a garnishment of the bills of exchange or other instruments, which in themselves express the obligation of the maker, by service upon the person having such instruments in his possession, would be effectual as a garnishment of the legal obligation of the maker or person whose obligation is thereby expressed. But that is not this case." *Ide v. Harwood*, 30 Minn. 194-195.

The Wisconsin and Michigan cases cited by plaintiffs' counsel are based upon statutes broader than our own. For instance, the Wisconsin statute provides that "from the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, moneys, *credits*, and *effects* in his possession or under his control, belonging to the defendant, or in which he shall be interested, to the extent of his right or interest therein, and of all debts due, or to become due, to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits, and effects held by a conveyance or title void as to creditors of the defendant, shall be embraced in such liability." *La Crosse Nat. Bank v. Wilson*, 74 Wis. 398.

Whether a creditor's bill would lie in this case would be an interesting question if it were before us. The question is discussed in 3 Freeman on Executions, Sec. 425. The undoubted hardship of a case like this suggests the importance of legislation upon the subject.

The exceptions are overruled and the case is remanded to the First Circuit Court.

HAWAIIAN COMMERCIAL AND SUGAR COMPANY v.
WAILUKU SUGAR COMPANY.

MOTION FOR REHEARING.

SUBMITTED JULY 21, 1904. DECIDED SEPTEMBER 13, 1904.

FREAR, C.J., AND CIRCUIT JUDGES ROBINSON AND MATTHEW-
MAN IN PLACE OF HARTWELL AND HATCH, JJ.

WATER RIGHTS—ancient, prescriptive, appurtenant.

Ancient water rights appurtenant to taro lands by reason of their use in connection with such lands, although such use was permissive before the issuance of Land Commission Awards, are often referred to as prescriptive rights, although the latter arise from adverse user; and they were intended to be included in "prescriptive rights" in the decisions in 9 Haw. 651 and 14 Haw. 50.

REHEARING—denied.

A motion for a rehearing based on the ground that the court erred in holding that "prescriptive rights" were intended in those decisions to include all appurtenant rights and that it otherwise failed to follow those decisions, is denied—the contentions not being sustained by the decisions.

OPINION OF THE COURT BY FREAR, C.J.

Fourteen grounds are set forth in the motion for a rehearing, but those that are relied on or that need be considered may be summed up in the proposition that the recent decision, reported in 15 Haw. 675, in respect of which a rehearing is sought, is in conflict with what has been referred to in this litigation as the *Lonoaea* decision, reported in 9 Haw. 675, as construed in the decision, reported in 14 Haw. 50, on the plea in bar in the present case. These last mentioned decisions are claimed to be con-

trolling—not merely as precedents on points of law, but as former adjudications respecting certain of the rights involved in this case. It is not contended that those decisions were overlooked by the court, for they are both referred to in the decision now called in question, but the contention is that the court failed to follow them on certain points in consequence of misconstruing or misunderstanding them. It is contended that certain rights were not adjudicated in the *Lonoaea* case and that that was so held in the decision on the plea in bar in this case, and that the court erred in its recent decision in holding that those rights were adjudicated in the *Lonoaea* case and in holding that they were held in the decision on the plea in bar to have been so adjudicated. A rehearing is desired in order that the claims in regard to these rights may be presented in argument to the court for adjudication now on the law and the evidence—the court not having gone into these questions as if they were still open questions, but having decided them on the theory that they were settled by the previous decisions. If they were settled by those decisions the court can not now grant the desired relief, however erroneous those decisions may have been. Counsel on both sides agree as to this, and of course we shall not go into the question whether those decisions were correct or not. We shall also pass by several preliminary questions that naturally suggest themselves as to the circumstances under which motions for rehearings should or should not be granted and will proceed at once to state wherein it is claimed that the court failed to follow the earlier decisions and why that contention can not be sustained.

Without going into details or stating exceptions or qualifications, it may be said generally that the court held in the *Lonoaea* case that the ancient right to a continuous flow of water in various auwais from the Wailuku stream had become converted by prescription into an alternate day and night right—this defendant sugar company to enjoy its prescriptive rights six days in the week and the taro planters their's seven nights in the week. In the decision on the plea in bar, it was held that the *Lonoaea* decision adjudicated the prescriptive rights but not the

rights to surplus water or to Sunday water, which was classed with surplus water, meaning by surplus water all that was not covered by prescriptive rights. In the recent decision the court held the same way, and that the defendant was not entitled to any surplus water, that the surplus water all belonged to the konohiki, but said that by prescriptive rights were meant all appurtenant rights, and limited those of the defendant, except those acquired since the *Lonoaea* decision, to six days in the week. No objection is made now to including in surplus water all freshet water in excess of what the cane and taro lands need or water that has heretofore run to waste. But it is contended that in the *Lonoaea* case and on the plea in bar the court meant by prescriptive rights only those that the defendant and the taro planters respectively had acquired adversely to each other, that is, the exclusive day and night rights respectively to the extent of their needs in time of scarcity, and that each continued to have the former continuous right to water in the time of the other, when there was any water to spare in such time, and that both continued to have their former rights in Sunday water, and that the court erred in its recent decision in holding that the exclusive day and night rights respectively covered all rights that were appurtenant to taro land—the defendant's rights being largely rights appurtenant to taro lands but transferred to and used on its cane lands. It is contended that the former rights appurtenant to taro lands are ancient and primary rights and not prescriptive rights; that they continue in so far as not changed by prescription; that there is an amount of water covered by those ancient rights over and above the strictly prescriptive rights before we reach surplus water, and that the court erred in classing these ancient rights with prescriptive rights and limiting them to the times allowed for prescriptive rights in the former decisions. Prescriptive rights, it is argued, are those acquired by adverse user, while the ancient rights were appurtenant to their respective lands as soon as the latter were awarded by the Commissioners to Quiet Land Titles, although they had

been permissive and not adverse theretofore. See *Dowsett v. Maukeala*, 10 Haw. 166.

We may grant that the so-called ancient rights are not prescriptive rights, but this does not settle the question. The question is, what did the court mean by prescriptive rights in the former decisions? If it meant to include all ancient or all appurtenant rights or if it was of the opinion that all such rights had become converted to or merged in prescriptive rights, the construction put upon those decisions in the recent decision was correct, however inexact the language may have been in the former decisions. It may be said of those decisions that they were their own dictionaries much as was said of a grant in *Damon v. Hawaii*, 194 U. S. 154, as follows: "When the description of land granted says that there is incident to it a definite right of fishery, it does not matter whether the statement is technically accurate or not; it is enough that the grant is its own dictionary and explains that it means by 'land' in the habendum, land and fishery as well."

The passage in the recent decision that is most in point and perhaps most complained of as to the meaning placed upon "prescriptive rights," is the following: "Water covered by prescriptive rights. As to this, the judgment in the *Lonoaea* case is a complete adjudication. As already decided on the plea in bar, the rights in the surplus water were not adjudicated. In our opinion, *all* of the respondent's prescriptive rights were adjudicated, including in the term prescriptive as here used the rights appurtenant to taro land. The right of taro lands to water has generally, if not always, been regarded and referred to by our courts as well as by parties as a prescriptive right acquired against the konohiki in the manner in which such rights can be acquired. In the decision on the plea in bar the term was so used."

In this passage the court recognized the possible inaccuracy in the use of the words "prescriptive rights" as covering ancient rights appurtenant to taro lands, and so, in order to avoid misunderstanding, made its own definition for the purposes of that

decision by expressly stating that it included "in the term prescriptive as here used the rights appurtenant to taro land." It stated also, apparently by way of partial justification for that use of those words, that "the right of taro lands to water has generally, if not always, been regarded and referred to by our courts as well as by parties as a prescriptive right acquired against the konohiki in the manner in which such rights can be acquired." Counsel for the defendant contend that such rights are not prescriptive, but, conceding that they are not, it is nevertheless true that they have often been treated as if they were. For instance, in the first reported case in regard to the rights in this very water, *Peck v. Bailey*, 8 Haw. 658, decided in 1867, when the ancient rights had not to the same extent as now lost their identity or become so generally merged in or confused with prescriptive rights, the immemorial or ancient or appurtenant rights were spoken of as prescriptive rights (see p. 672), and in the later (1891) case of *Kahookiekie v. Keanini*, reported in the same volume, p. 310, such rights were referred to as "acquired * * * by prescription." Such application of the word "prescriptive" may have been due in part to the fact that there is little or no difference between these two classes of rights for practical purposes, that it is often impossible at this late date to say from the evidence where one class ends or the other begins, that they are both appurtenant rights by reason of their use in connection with the land, and that although the user is adverse in the one case and was originally permissive in the other, yet in the latter it was treated as if it had been adverse or as if a title had been acquired to the water rights as well as to the land for the purpose of a Land Commission Award. The occupation of the land itself was permissive in the same way prior to the awards and yet had already come to be regarded as more or less a right, subject to forfeiture only for cause.

The court further stated in the passage referred to that "in the decision on the plea in bar the term was so used." This is an adjudication—a construction of that decision by the same Justices who rendered it. The court did not take the position

now complained of through inadvertence or oversight. It considered the two former decisions and not only stated that "prescriptive" was used in this sense in its own decision on the plea in bar but also held in this same passage that the *Lonoaea* decision covered all prescriptive rights, using that term in this sense.

But was the term "prescriptive" in fact used in the alleged restricted sense in the former decisions? In the *Lonoaea* decision, p. 661, the court referred to "kalo land which had acquired water rights by prescription" in such a way as to show that it meant to include the ancient rights. On page 664, in comparing the quantity of water under the ancient right with that under the right as changed by prescription to an alternate day and night right, it referred to the kalo land as land "which has acquired right to water by prescription"—meaning before the change to the day and night right. Lastly in its final judgment, p. 665, it held that the taro planters were entitled during the seven nights in the week to "such amounts of water as they have acquired by prescription for their various lands," and that the defendant was entitled during six days in the week to "the water for its present estate from these auwais." Here all appurtenant rights must have been included. The decision was that the right which had been acquired previously had become changed as to the time of user—not that some of those rights had become so changed or that a new right to an additional quantity of water had been acquired. It was that the continuous right had become changed to an alternate day and night right, not to a right in part continuous and in part alternate. The material change was in the time of user, not in the quantity of water. The decision was not that a right to a certain quantity of water during certain hours had been acquired, but that a right to a certain quantity continuously had been changed to a right to that quantity alternately. The alternate right was not a right acquired as to quantity by adverse user. If that were so, the former right to the former quantity would remain, unless lost by abandonment, which was not the case, and there would be rights to twice the water in the stream, which would be absurd. The old rights

as to quantity remained substantially the same, and the new right consisted merely in the change of time. The one was a substitution for, or a change in, not an addition to, the other. If that judgment related only to the rights as changed by prescription as distinguished from all ancient appurtenant rights, assuming that those two classes were not coextensive or that one had not been converted into the other or that the ancient exceeded the prescriptive, it would be absurd and nonsensical and vain repetition, a mere begging of the question, for it would mean that the taro planters were adjudged to be entitled by prescription during the night to such amounts of water as they had become entitled to by prescription during the night, and similarly as to the defendant, *mutatis mutandis*. But if the court meant all appurtenant rights, the judgment would be sensible, for it would mean that the taro planters had become entitled by prescription during the night to the amount of water to which they had previously been entitled continuously, and similarly as to this defendant by day. The judgment covered all appurtenant rights acquired by the taro planters "for their various lands" and by the defendant "for its present estate," not for some of those lands or in part for those lands. Other passages in the *Lonoaea* decision pointing in the same direction need not be referred to.

The decision on the plea in bar is likewise full of indications that the court intended to include in prescriptive rights all appurtenant rights and that it considered that in the *Lonoaea* case the question was whether the ancient rights, that is, all of them, had become changed from continuous to alternate rights, that is, changed merely as to their mode of user, but we need not cite passages to show this in the same way as we have done in the case of the *Lonoaea* decision. We will confine ourselves to another line of argument. That decision—on the plea in bar—divided all the water into two classes—surplus and prescriptive. It defined, on page 61, "surplus water" as all water "that was not covered by prescriptive rights." Therefore, if there were any ancient rights that were not strictly prescriptive

rights, they must have been intended to be included in either rights to surplus water or prescriptive rights. It would be ridiculous to include definite appurtenant rights, arising from user, in rights to surplus water; and all three decisions, all of which divide the water into prescriptive and surplus, go to show that the inclusion of appurtenant rights in rights to surplus water has in no case been intended. The only reasonable view is that the court intended to include in prescriptive rights all definite appurtenant rights, and especially as that has been usual in the past, as above pointed out. And on pages 63-64, the court in passing from a consideration of prescriptive rights to a consideration of rights to surplus water, used various expressions to denote definite appurtenant rights and contrasted all such rights with rights to surplus water. It says: "The question further arises, however, whether the court did not decide elsewhere in the opinion, not indeed that the day or the night right or the prescriptive rights or any absolute or exclusive right to any particular quantity or for any particular time covered the surplus water, but that all parties had a right to a reasonable proportion of the surplus water." Reference has been made already to the statement in the recent decision that in the decision on the plea in bar appurtenant rights were intended to be included in prescriptive rights.

But it is contended that the court in its recent decision erred, not merely in holding that the previous decisions went farther than they did, in so far as it held that all appurtenant rights had been included in prescriptive rights and that there were no appurtenant rights over and above prescriptive rights unadjudicated by the previous decisions, but also in overlooking the fact that it had been expressly held, as contended, in the decision on the plea in bar, that surplus and Sunday water had not been adjudicated in the *Lonoaea* case. The passage in the decision on the plea in bar relied on in support of the latter contention reads as follows, p. 68: "It is not *res adjudicata* that the defendant is entitled by prescription, subject to the above mentioned exceptions, to all the water, however much there might be,

in the stream during the times above mentioned, or that the defendant is entitled to a proportional share or any share of the surplus or Sunday water, or that it is not so entitled."

It is not disputed that Sunday water has been classed as surplus water in all three decisions. No distinction can now be made between these. The passage just quoted states in plain language precisely what the court held and it is not in conflict with the recent decision. The defendant contended on the plea in bar that the *Lonoaea* decision awarded to it under its prescriptive rights all the water in the stream during the day and a reasonable proportion of the surplus and Sunday water, but the court held, as it stated in the passage above quoted, that the *Lonoaea* decision was not *res judicata* that the defendant was entitled to all the day water by prescription, and that it was not *res judicata* whether it was entitled or not to a proportional or any share of the surplus or Sunday water. The court in its recent decision proceeded consistently with this, taking the view that the *Lonoaea* decision adjudicated only all prescriptive rights and not at all the surplus or Sunday water. To hold that there has been no adjudication as to whether the defendant is entitled or not in some way to any of the surplus or Sunday water is not inconsistent with the view that it has been adjudicated that the defendant has no definite prescriptive or ancient or appurtenant right to such water. All appurtenant rights, whether prescriptive or ancient, have usually or at least frequently, been adjudicated as to particular lands, without any adjudication as to whether any surplus water could be taken under a right of some kind for such lands. The words "by prescription" found in the statement of the first proposition in the passage last above quoted were not intended to go with the second proposition also. To imply them in the latter would make that proposition have a very different meaning from what was evidently intended, if not an absurd meaning; it would be inharmonious with the construction of the sentence, especially in view of the repetition of the words "that the defendant is entitled" and the omission of the words "by prescription" in the second proposition; it

would also make this passage, which is part of a summary of the opinion, inconsistent with the body of the opinion which it purports to summarize. In the first proposition the court summarized what it had stated in regard to prescriptive rights on pages 61-63; in the second proposition, what it had stated in regard to surplus and Sunday water on pages 64-66. Compare the passages in question with the passage above quoted from page 63, where the court contrasts the two classes of rights in passing from a consideration of one to a consideration of the other. Apart from the above reasoning, if the court included ancient rights in prescriptive rights, as in our opinion it did, there could of course be no such rights to the surplus or Sunday water, for the latter was defined as including only what was not covered by prescriptive rights. In its recent decision the court proceeded on the view that the question whether the defendant had a right to any of the surplus or Sunday water was unadjudicated. It expressly stated, in the passage first above quoted from the recent decision, that "as already decided on the plea in bar, the rights of the surplus water were not adjudicated." It discussed the question and held irrespective of the previous decisions, that the defendant did not have a right to any of that water.

The question whether a rehearing should be granted on the further ground that the court failed to credit the defendant with Sunday water as well as night water in respect of lands purchased from taro planters since the *Lonoaea* decision, is disposed of by the foregoing reasoning.

The motion for a rehearing is denied.

W. O. Smith and *Castle & Withington* for the plaintiff.

Kinney, McClanahan & Cooper and *Ballou & Marx* for the defendant.

CONCURRING OPINION OF CIRCUIT JUDGE ROBINSON.

As, in my judgment, this court, in its decision of the case at bar (15 Haw. 675) not only did not overlook any, but, without exception, fully considered all of the many points raised by

counsel for respondent in its petition for rehearing, I concur in the order denying respondent's motion for rehearing. I also concur in what is contained in the opinion of the Chief Justice in reference to the meaning and scope of the term "prescriptive rights," as used and employed in both the *Lonoaea* and "plea in bar" decisions.

TERRITORY OF HAWAII v. BENJAMIN HAYWARD
WRIGHT.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED AUGUST 2, 1904. DECIDED OCTOBER 4, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

EMBEZZLEMENT—*Chief clerk of department of public works.*

The defendant was appointed by the superintendent of public works as chief clerk of the department of public works and clerk of the market, his duties as such clerk being prescribed by the superintendent, amongst them being the charge of public money received at the department, the salary for his office being appropriated by the legislature but no statute specifically authorized his appointment or placed him in charge of public money: *held* that the defendant was within the class of persons designated in section 158, P. L., viz.: "Whoever, being a collector, cashier, clerk or other person employed in the Government Treasury, or in any other department of the Government, is guilty of embezzlement of any money, note, or other effects or property belonging to the Government."

OFFENSE OF EMBEZZLEMENT.

Defendant's receipt of \$3,289.53 as chief clerk of the department of public works, receipted for by him as such clerk, his failure on demand to account for the money, offer to give his check for it, asking that the matter be kept quiet, his failure, when asked, to say what he had done with the money, and his concealment of it, not

making any deposit of it in the official safe in the office, and failing to pay it into the treasury, constitute in law the offense of embezzlement as defined in Sec. 157, P. L.

CONVERSION—intent.

The foregoing acts and conduct of the defendant are evidence of his fraudulent conversion or disposition of the money to his own use and benefit or the use and benefit of another than the owner or person entitled thereto under Sec. 157, P. L.

DEFENDANT'S SUSPENSION—evidence of.

A witness for the prosecution testified that the acting superintendent of public works told the defendant that he suspended him. The objection made by the defendant to the evidence that "conversations could not be shown until proof of embezzlement of some specific sum" did not sufficiently raise the question as to the relevancy of the evidence of the suspension of the defendant.

EVIDENCE—of stub book, cash receipt book, and auxiliary book kept by clerks in office of superintendent of public works.

A stub book of receipts, cash receipts, and auxiliary cash book kept by clerks in the department of public works under the defendant's supervision were admissible in evidence to show the method of transacting business in the office and that no entry was made in those books of the receipt of the money alleged to have been embezzled; the audit act of 1898 not requiring that the Auditor General establish a uniform system of keeping public accounts, the absence of evidence that he had done so does not take from these books their character as public records.

CROSS-EXAMINATION—of witness to defendant's signature.

Refusal of the court to allow a witness to the defendant's signature to a receipt for money to be asked on cross-examination whether he had compared the writing with other writings of defendant held not to be prejudicial error, the defendant having substantially admitted the receipt of the money.

OPINION OF THE COURT BY HARTWELL, J.

The defendant was tried at the February Term, 1903, of the First Circuit Court, De Bolt, J., presiding, upon an indictment charging that on August 25, 1902, "and for two weeks next thereto preceding, he, the said Benjamin Hayward Wright, being then and there a clerk employed in the office of the Superintendent of Public Works, a department of the Territory of

Hawaii known as the Department of Public Works, as chief clerk and clerk of market, and by virtue of his said employment being a public accountant, charged with the duty of collecting and receiving revenue and other moneys on account of the said Territory of Hawaii, and he, the said Benjamin Hayward Wright, being then and there entrusted with and having the possession, control, custody and keeping, by virtue of his said employment, of a thing of value, to wit, certain money to the amount and of the aggregate value of three thousand two hundred and eighty-nine dollars and fifty-three cents (\$3,289.53), a more particular description of which said money is to the grand jurors unknown, of the money and property of the said Territory of Hawaii, by the consent and authority of the said Territory of Hawaii; the said Benjamin Hayward Wright the said money then and there feloniously did embezzle and fraudulently convert and dispose of to his own use and benefit, without the consent and against the will of the said Territory of Hawaii, the owner thereof and entitled thereto, contrary to the form of the statute in such case made and provided.

“And the grand jurors aforesaid, upon their official oaths aforesaid, do further say and present that the said Benjamin Hayward Wright of Honolulu, in the Island of Oahu in the First Circuit, at Honolulu, in the Island of Oahu, and in the circuit aforesaid and within the jurisdiction of this honorable court, on the 6th day of September in the year of our Lord one thousand nine hundred and two, and during six months next thereto preceding, he, the said Benjamin Hayward Wright, being then and there a clerk employed in the office of the Superintendent of Public Works, a department of the Territory of Hawaii known as the Department of Public Works, as chief clerk and clerk of market, and by virtue of his said employment being a public accountant, charged with the duty of collecting and receiving revenue and other moneys on account of the said Territory of Hawaii, and he, the said Benjamin Hayward Wright, being then and there entrusted with and having the possession, control, custody and keeping, by virtue of his said employment, of a thing of value, to wit, certain money to the amount and of the aggregate value of four thousand nine hun-

dred and eighty-two dollars and ten cents (\$4,982.10), a more particular description of which said money is to the grand jurors unknown, of the money and property of the said Territory of Hawaii, by the consent and authority of the said Territory of Hawaii; the said Benjamin Hayward Wright the said money then and there feloniously did embezzle and fraudulently convert and dispose of to his own use and benefit, without the consent and against the will of the said Territory of Hawaii, the owner thereof and entitled thereto."

The verdict of the jury was that they found the defendant "guilty on first charge and not guilty on second charge."

The defendant's counsel excepted to the verdict as contrary to the law and evidence and weight of evidence and gave notice of motion for new trial. Thereupon the following remarks upon the form of the verdict were made:

THE COURT. Are you satisfied with the form of the verdict, Mr. Attorney-General; should it not be the "first count"?

MR. ANDREWS. It should be the "first count."

MR. DAVIS. I submit the verdict must be accepted as handed by the jury, and that no change can now take place after its announcement.

MR. ANDREWS. I think the verdict can be handed back for clerical change.

MR. DAVIS. I submit it is not clerical change. I submit the verdict must be received as delivered by the foreman of this jury.

THE COURT. The indictment, gentlemen of the jury, sets forth the charge in two counts.

THE FOREMAN (Mr. Black). We took the indictment on the first charge—the one of the note.

THE COURT. They are merely designated here as charges, it is true, and during the progress of the trial were spoken of as counts. The indictment does not designate them as counts, merely as the first and second charge.

This was clearly a verdict of guilty on the first count.

The defendant afterwards excepted to the denial of his motion for new trial.

Numerous exceptions were taken by the defendant at the trial, many of which frequently reappear and are repeated, in order, probably, to avoid the appearance of waiving an objection at any stage in the trial. All these exceptions are discussed and most of them are argued very elaborately in briefs of defendant's counsel, although in their oral argument they condensed and classified the contentions on which they said they relied, in substance as follows:

1. The employment of the defendant as chief clerk of the department of public works and of the market was not authorized or sanctioned by law, the defendant being merely the clerk of the superintendent of public works.

2. The defendant was not by authority or sanction of the law placed in charge of the public money which he is charged with having embezzled. It was the duty of the superintendent to take charge of that money, a duty which he could not delegate to the defendant.

3. There was no evidence that the defendant fraudulently converted the money to his own use. The evidence in the case authorizes the inference that he paid the money into the treasury in a deposit made two days after the date of the embezzlement alleged in the first count.

4. The prosecution ought not to have been allowed to show in evidence that the defendant had been suspended from his office by the acting superintendent of public works on the occasion of the discovery alleged to have been ascertained of the shortage in the defendant's accounts.

5. The stub book of receipts, cash receipt book and auxiliary cash book kept by the clerks in the department of public works ought not to have been received in evidence as public records, not having been kept upon a system authorized by the auditor general, and being nothing but hearsay evidence.

6. The defendant in cross-examination of the witness Siemsen, who had testified to the signature of the defendant to a receipt by him of \$3,289.53 from the Hawaiian Electric Com-

pany, ought to have been allowed to ask the witness whether he had compared the alleged signature with any of the defendant's writings.

We can not concede the validity of the defendant's contention based on the claim that his employment as chief clerk of the department of public works and of the market was not authorized by law, and that no law authorized the entrusting him with the public money in question. The evidence shows that at the time of his alleged embezzlement he was employed in the alleged capacity, receiving his appointment from the superintendent, the legislature having made an appropriation for salary of chief clerk and clerk of the market, in its appropriations for the Department of Public Works.

The defendant on this showing was not an employe of the superintendent, but a Territorial employe within the class of persons designated in the statute under which he is indicted, which reads as follows:

"Whoever, being a minister, collector, cashier, clerk or other person employed in the government treasury, or any other branch of the department of finance, or in any other department of the Government, is guilty of embezzlement of any money, note, or other effects or property belonging to the Government, shall be punished by imprisonment at hard labor for life or any number of years, or by fine not exceeding five times the value of the thing or property embezzled." Sec. 158, P. L.

This statute does not require that in order that any person therein designated may commit the offense of embezzlement of public funds there shall be an express statute authorizing his employment in the capacity mentioned. The only thing which is required by the statute is that such person be *employed* in any department, whether as a "collector, cashier, clerk, or other person."

Nor does this statute require that in order that such designated person so employed be entrusted with or have possession of public money there shall be an express statute authorizing him to be entrusted with the money or to have possession of it. The following is the statute, viz.:

"If any person who is entrusted with, or has the possession, control, custody or keeping of a thing of value of another, by the consent or authority, direct or indirect, of such other, without the consent and against the will of the owner, fraudulently converts or disposes of the same, or attempts so to convert or dispose of the same, to his own use and benefit, or to the use and benefit of another than the owner or person entitled thereto, he is guilty of the embezzlement of such thing." Sec. 157, P. L.

In *U. S. v. Hartwell*, 73 U. S. 386, cited in oral argument by defendant's counsel, the defendant was indicted for embezzling money while clerk in the office of a United States Assistant Treasurer. The indictment, in so far as it was based on the sixteenth section of the Sub-Treasury Act of 1846 was sustained. As stated in the minority opinion, "the clerks in the office of the assistant treasurer are, by the terms of this act, appointed by him alone, although by an act passed long since, and which can have no effect on the construction of this one, the assent of the secretary of the treasury is required. But they still derive their appointment from the assistant treasurer, and are removable at his pleasure. Their duties are prescribed by him, and he assigns each clerk to the performance of such functions as he may think proper. No act of Congress, nor any other law, confers upon these clerks any power or control over the public money. If they exercise such control, they get it from the assistant treasurer alone. They give no bond to the government, but the assistant treasurer may require them to indemnify him by bond, as is the rule in many large establishments. Their direct responsibility is to him." *Ib.* 399.

The minority opinion further says: "It may be also conceded that the defendant's position as clerk is an office provided for by statute, the salary of which is also fixed by a subsequent act of congress." *Ib.* 398.

The report of the case in Wallace's reports, 73 U. S. 385, contains an abridged statement of the argument of the defendant's counsel. A further statement appears in the Lawyer's Edition (18 L. E. 831), in which they are reported to have said that the defendant was appointed under the Act of July 23,

1866, 14 Stat. at Large, 202. The statute referred to appropriated money "for salaries of the clerks and messengers in the office of the assistant treasurer at Boston," and authorized the assistant treasurer "to appoint with the approbation of the secretary of the treasury" certain clerks with designated salaries. The defendant claimed that he was not an officer of the United States; that no statute prescribed his duties, but that he was merely a subordinate and assistant to the officer in charge, giving no bond and performing such services as he directs. *Ib.*

The case was thus stated by the court, viz. :

"Was the defendant an officer or person 'charged with the safe-keeping of the public money' within the meaning of the act? We think he was both.

"He was a public officer. The General Appropriation Act of July 23, 1866, authorized the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks, who were to receive, respectively, the salaries thereby prescribed. The indictment avers the appointment of the defendant in the manner provided in the act.

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

"The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe."

The case above cited sustained our view that it was not requisite that in order to charge the defendant as a "clerk or other person employed in the department of public works", his custody of public money as such clerk should be expressly authorized by statute.

It is true that the U. S. Act of 1846 applies by its express terms to "officers and other persons charged by this act or any other act with the safe-keeping, transfer and disbursement of the public money." But we do not think that the absence of such

statutory provision is material since the common law makes any person who is entrusted with money liable for its proper application. The material question was whether the defendant was a territorial employee, or an employee of the superintendent. The section of the Penal Code under which in part the indictment was founded is broad enough to include, and we think that it does include any territorial employee of the class designated in that section who is in fact entrusted with the custody of public money.

The "consent or authority" of the territory for entrusting public money to the defendant while employed as the chief clerk of the department of public works may be either "direct or indirect."

The functions of the superintendent of public works are too extensive to permit him to remain constantly in his office so as to be the recipient and custodian of the large revenues constantly coming in there.

The legislature in providing in the Audit Act of 1898 for public accountants as recipients of public revenue either by law or by regulation or by appointment, must have contemplated appointments by heads of departments to meet precisely such conditions as above mentioned.

The following language of the court in the case cited is peculiarly appropriate to the present case, viz.:

"If the subordinates are not within the Act, there is no provision in the laws of the United States for their punishment in such cases. So far as those laws are concerned, they may commit any of the crimes specified with impunity. We think it clear that it was not the intention of Congress to leave an omission so wide and important in the Act, and our minds have been brought satisfactorily to the conclusion that they have not done so."

The defendant was a public accountant as described in Section 29 of the Audit Act of 1898, viz.:

"All persons who, by any law, regulation or appointment are now, or shall hereafter, be charged with the duty of collecting or

receiving revenue or other moneys on account of the Hawaiian Government, or with the duty of disbursing moneys on account of the public service, shall become and be 'Public Accountants', and shall perform all such duties and render such accounts as this Act prescribes, and as the Minister of Finance and Auditor-General shall from time to time direct."

There is no requirement of statute that the appointment to receive public money shall be explicitly provided for or authorized by statute. The use in the section of the act above quoted of the words "by any law, regulation or appointment," implies that the regulation or appointment is something distinct from an appointment authorized by statute. The evidence that the superintendent placed the defendant in charge of the public money in the office is equivalent to appointing him to do so.

Cases are not in point which are cited for the defence, to the effect that there can be no *de facto* officers unless for an office which exists *de jure*; and that persons claiming to hold an office not authorized by law can perform no valid official acts. In *Norton v. Shelby County*, 118 U. S. 451, which is an instance of such cases, bonds issued by an unauthorized Board of the defendant county in payment of stock subscribed for by the Board were held to be invalid.

The defendant's counsel strenuously contended that the evidence does not sustain or justify the verdict or show that the defendant received the money and fraudulently converted it to his own use.

The evidence justifies findings as follows: that on August 16, 1902, the defendant, while employed as chief clerk of the department of public works and of the market, and by virtue of that employment and in no other capacity had possession by the consent or authority of the Territory of the sum of \$3,289.53 belonging to the Territory, being money received by him on a check of the Hawaiian Electric Company, Limited, drawn on the Bank of Hawaii in favor of the department of public works, which check he that day cashed. That on September 9, 1902, at

the office of the superintendent of public works, in the presence of Attorney-General E. P. Dole, High Sheriff Brown, Acting Superintendent and Treasurer William H. Wright, Deputy Auditor Meyers, Siemsen and Cook, clerks in the department of public works, the defendant, being requested to open the combination safe in the office, after trying to open it, said he had forgotten the combination, ran to the telephone and rang up his attorney, Long, who soon after came, when the defendant opened the safe, and also unlocked and opened the inner drawer of the safe containing money. The deputy auditor counted the money in the defendant's presence and announced that there was \$5,252.10 short in the accounts of the public works office; that at that time the check above mentioned was shown to the deputy auditor and then to the defendant, who asked the deputy auditor what it all amounted to, and being told that it was \$8,541.63, and asked whether it was right, said that is about it. The defendant then said he would give his check for that amount. Dole asked him, "Will the check be paid?" He said he would require four days to raise the amount, and requested that the matter be kept quiet. To the question asked by the attorney general, "And what did you do with the money?" the defendant, upon the instruction of his attorney, made no answer. During a portion of the interview Cook, one of the clerks, went out and returned with the defendant's receipt to the Electric Company for the sum of \$3,289.53, dated August 15, 1902, being the same sum for which the Electric Company's check had been drawn, dated August 15, 1902, payable to the Department of Public Works or order, which check is endorsed "Public Works paid, Aug. 16, 1902, per B. H. Wright, Chief Clerk."

On August 18, 1902, it appears by the evidence that the defendant deposited in the treasury of the Territory the sum of \$11,379.14, with an accompanying statement signed and sworn to by him showing the sources from which that same money came, namely:

Excavator	\$ 658 40
Rents	7,278 26
Realizations	767 00
Sewerage	407 38
Market	1,181 60
Weights and Measures	10 00
Garbage	1,076 50
	<hr/>
	\$ 11,379 14

The defendant's counsel claim that this \$11,379.14 might have included the \$3,289.53 received by the defendant on the Electric Company's check, two days prior, on the theory that there may have been former deficiencies required to be made good by using the latter sum; but there is no basis for such theory. The defendant's sworn statement of the sources from which the larger sum was derived justifies a finding that he did not get any of it from the proceeds of the Electric Company's check.

The defendant's receipt of the said sum of \$3,289.53 in his capacity as chief clerk of the department of public works, which was receipted for by him as chief clerk, his failure when called upon to do so to account for the money, his offer to give his check for that money, and for other public money admitted by him as a part of the shortage in the accounts of the public works office, his failure, when asked, to say what he had done with the money, his concealment of the money and his request that the matter be kept quiet, constitute in law the offense of embezzlement as defined by the statute. It is true that the defendant's fraudulent converting or disposing of this money "to his own use and benefit or to the use and benefit of another than its owner or the person thereto entitled" is not to be inferred from his having received the money and failed to pay it over to the Territorial treasurer; but the case shows more than a mere shortage of accounts; it shows that the defendant concealed the fact that he had received this money, and also concealed the money, the concealment consisting in his either retain-

ing it or placing it in some place which he declined when requested to mention, in not paying it into the treasury from the date of its receipt by him on August 16 until September 9 or at all nor keeping it in the official safe in which it was usual to deposit such money. Not only the defendant did not account for the money when required to do so, or pay it to the person thereto entitled, namely, the treasurer, but after admitting its receipt, when asked what he had done with it, he would not say. The money being traced to his possession, was as effectually converted or disposed of by him to his own use and benefit, or to the use and benefit of some other than the person thereto entitled by his retaining it and when called upon to account for it by failure to produce it or to tell where it was, as if he had expended or invested the money, given it away or shared it with others.

"Evidence was given which tended to show that defendant concealed the facts as to the disposition made of some of the property, and that he rendered a false account of his agency in regard to it. At least two witnesses testify to a demand for the property in controversy, made on the part of the company. It is not shown that defendant complied with the demand, but it appears that he failed to do so." *State v. Pierce*, 77 Ia. 249.

"The offense is sufficiently made out, within the meaning of the statute, if the jury are satisfied that the prisoner received in the aggregate the amount with which he appears to have charged himself, and that he absconded, or refused, when called upon to account, leaving a portion of the gross sum deficient." *Queen v. Lambert*, 2 Cox C. C. 310.

"If the defendant had, upon the demand of Ah Fook, returned him the money, as he might say that he had forgotten, or could not find the person, or did not care to take the trouble to deliver the money in China, it would not be held to be an embezzlement in China. His failure to account for the money here to Ah Fook also makes it embezzlement." *King v. Chock Hoon*, 5 Haw. 374.

"The usual evidence given of embezzlement is that, having received the money, the defendant denied the receipt of it, or did not account for it when he ought, or accounted for other moneys received by him at the same time or afterwards, and not for it, or rendered a false account, or practiced some other deceit, from which the jury may fairly infer that the defendant

either actually disposed of the money to his own use, or withheld it with intent to do so and to defraud the owner." *State v. Baumhager*, 28 Minn. 231.

Reg. v. Lynch, 6 Cox C. C. 445, is cited by defendant's counsel for the rule there stated by the court, that "receiving and not forthwith accounting for it (money) does not amount to embezzlement". But the court added: "You are to get from all the facts of the case, whether or not there has been an appropriation of the money. You may come to the conclusion from the lapse of time, that it was not a mere neglecting to account, but you have further the fact that, after getting this money, he absconded, and did not come back until he was in custody. You may infer that he intended to appropriate this money, and if so he is guilty of the crime with which he is charged." *Ib.* 446.

As to the defendant having intended fraudulently to convert or dispose of the money to his own use, "Every one shall be presumed to intend the natural and plainly probable consequences of his own acts." P. L., Section 14.

In *Prov. Govt. v. Gertz*, 9 Haw. 288, the defendant had imported certain cases of goods in which opium was found, "the presence of the opium there was wholly unexplained." The court said, "In view of these facts it seems to us to have been properly left to the jury to say whether there was an intent on the part of the defendant to import the opium," adding, "Where, as in this instance, the opium is shown to have been in a case of goods imported by the defendant, and no explanation of this fact in any way appears, and it does not appear that it was not in the power of the defendant to procure evidence exculpating himself, or that any attempt was made to procure such evidence, it seems to us that the court properly submitted the question to the jury to find whether, as an inference of fact, the opium was imported with the knowledge or consent of the defendant." *Ib.* 293.

The same question arose in *Rep. v. Anderson*, 10 *Ib.* 252, in which the court said, "While no inference prejudicial to one accused can be drawn from his neglect or refusal to give evidence

on his own behalf, yet where the evidence for the prosecution is such as to throw great suspicion upon him, his failure to produce or to endeavor to procure for production evidence which would explain his position or the facts casting suspicion upon him, when, so far as appears, it is within his power to do so, may properly be considered in passing upon the question of his guilt." *Ib.* 255.

While "intent is an essential ingredient of all crimes at the common law, in some offenses, the creatures of statute, it is not. Again in some instances the act by which the crime charged is committed is in and of itself evidence of a guilty knowledge or intent." N. 62 L. R. A. 226.

The same view is stated in *U. S. v. Harper*, 33 Fed. 481, in the following language: "Intent may be shown, or may be conclusively presumed, from the doing of the wrongful, fraudulent, and illegal acts, which in their necessary results naturally produce loss or injury to the association. The law presumes that every man intends the legitimate consequences of his acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. This is the well settled rule which the law applies in both civil and criminal cases involving the question of intent. Human affairs could hardly be conducted, nor civil order be preserved, under any other. When the prohibited act is knowingly and intentionally done, and its natural and legitimate consequence is to produce injury to the association, or benefit to the wrong-doer, the intent to injure or defraud is thereby sufficiently established to cast on the accused the burden of showing that his purpose was lawful and his act legitimate."

The inference that one "intends the natural and plainly probable consequences" of his acts does not dispense with proof of the acts; but when defrauding another is a necessary or plainly probable result of the acts shown, the intent to defraud

is thereby also shown. In this case, the defendant's failure to dispose of the money as required by law, or to account for it when requested, was a breach of his duty at common law, as well as under the provisions of the Audit Act, the necessary result being that the Territory was defrauded of the money, a result which the law authorized the jury to regard the defendant as having intended.

The duties of the defendant as such public accountant are defined in Section 30 of the Audit Act, viz.:

"Every such public accountant collecting or receiving revenue or other moneys aforesaid in Honolulu shall pay weekly, or at such times as may be otherwise specially appointed, into the Treasury all sums of money collected or received by him on account of the revenue or otherwise as aforesaid, accompanied by vouchers bearing his signature, and which sum shall have been collected or received, and unless otherwise specifically directed, shall not later than the tenth day after the expiration of each month, transmit to the Auditor-General a return in the form contained in Schedule 'E,' hereto annexed with such particulars in each case as may be required by the Auditor-General, of all moneys collected or received by him during the preceding month, and shall make and subscribe to an oath in the form prescribed in this schedule."

We are of the opinion that the evidence justified a finding that the defendant received the money on the Electric Company's check and fraudulently converted or disposed of it to his own use and benefit or to the use and benefit of another than the Territory of Hawaii.

The defendant's counsel urged upon the court with much force that evidence ought not to have been given to the jury that the defendant had been suspended from his office, since it could show no fact tending to prove the defendant's guilt, and might have had a prejudicial effect upon the jury, citing particularly *Goodhue v. People*, 94 Ill. 307, a case which strongly supports counsel's view. But the record does not show that this particular evidence was objected to by the defendant or that any motion was made to rule it out. The witness Cook, placed upon the stand by the prosecution, was asked whether he heard "any

conversation between W. H. Wright and the defendant on Monday, the 8th." Defendant's counsel objected, that "Conversations are not admissible until they prove an embezzlement of some specific sum alleged in the indictment." The court asked if the prosecution wished to show by the witness what was said and what occurred there, to which the attorney for the prosecution answered that he wished to show the suspension of the defendant on Monday, the 8th, by W. H. Wright, who was left in charge of the department.

THE COURT. The defendant was present?

CATHCART. Yes.

THE COURT. Objection overruled.

DAVIS. Exception. (Page 40 transcript.)

The witness then went on to say that "W. H. Wright told the defendant he was suspended right then. There was nothing said and he went right out."

The question of the admissibility of this evidence on the ground that it was irrelevant was not raised or ruled on at the trial. The objection which was made to the evidence, namely, that conversations could not be shown until proof of "embezzlement of some specific sum" did not raise the question now presented.

It was after the foregoing objection was made that the witness testified as follows:

"Wright came in first, B. H. Wright, and he came in right after him, and he told me then that he just met Wright outside turning the corner of Hotel on a hack, and that is the reason he came right back; and he told him that he was suspended right then. There was nothing said and he went right out." (Pages 40-41 transcript.)

To the evidence thus given defendant took no exception and asked for no ruling in regard to it. This exception is therefore overruled.

As to the stub book, cash receipt book and auxiliary cash book kept by the clerks in the office, we think that they were properly admitted in evidence, not for the purpose of proving that the

defendant had embezzled the money, but to show the method of transacting business in the office, and that no entry was made in those books of the receipt of the money alleged to have been embezzled. The evidence shows that these books were kept under the direction and supervision of the defendant, who before he took the day's cash from the clerk who received it required a comparison to be made in his presence between the stub book and cash receipt book, to ascertain if they tallied. These two books are properly within the description of original, contemporaneous entries for the correctness of which the defendant made himself responsible by his control and supervision over them. As to the auxiliary cash book, which is merely a book in which the cash receipts shown by the stub book are grouped together according to subject matter as for instance for "rents", it was not objected to on the ground that it was not an original entry.

The general objection was made to all these books that they were not kept according to a system shown to have been established under the provisions of Section 10 of the Audit Act of 1898, viz.:

"The Auditor-General shall have power, with the approval of the Minister of Finance, to establish throughout all departments and bureaus of the Government a clear, methodical and uniform system of public accounting and to enforce the said system."

The exercise of this power to establish a uniform system of public accounting, is not made mandatory upon the Auditor-General. His failure to exercise the power does not take from the records which were kept in this case their character as public records.

The following extracts from the evidence on the subject of these books are made. The witness Siemsen testified for the prosecution (p. 19 transcript evidence) "that he had been employed as clerk in the office of the superintendent of public works since August 1, 1901, and was put in charge of the window, receiving and giving receipts out, and I was under the instructions of Mr. B. H. Wright", adding, "when people came

to the window to make payments I took the money and gave them receipts for it and at the close of the day, that is at 4 o'clock I would make out the cash statement and give it to Mr. Wright," (p. 20 *Ib.*) the receipts being taken from receipt books having stubs, concerning which the witness testified (p. 21 *Ib.*) "I filled out the stubs and filled out the receipts for the amount that was paid to me on whatever account it is paid for", turning the stubs over at the close of each day to the bookkeeper Manuel Cook, (p. 22 *Ib.*). The witness testified further as to these transactions as follows, viz.:

"Q. And what would you do with the cash?

"A. The cash I turned over to Mr. Wright.

"Q. Now did you—did you just turn it over,—did you count it or do anything like that with it?

"A. I counted it and made a cash statement; with this statement and the cash that comes to Mr. Wright and Mr. Wright goes over it and sees that it is correct before he puts it in his safe.

"Q. What safe is it that you say that the defendant would put the money into when he received them from you?

"A. In the safe that he had in charge.

"Q. Did you have any access to that safe?

"A. No sir.

"Q. what would become of those statements of the cash on hand that you would turn—give to the defendant every evening?

"A. He keeps it.

"Q. And then what becomes of them?

"A. I don't know; he puts it in his safe; he might destroy them; I don't know what he does with them.

"Q. You have stated that in the afternoon of each day you would turn the cash over to the defendant with a statement of the amount on hand; did that happen every day?

"A. No sir.

"Q. What would be the disposition of it on some days and how did it come that that disposition would be made?

"A. Some evenings I would get my cash statement ready and the cash ready to give it to Mr. Wright and he refused to take it. He tells me to hold it over for the next day.

"Q. Giving any reason?

"A. The only reason that he gives is the safe ain't opened

and he says, 'I don't feel like opening my safe just now. Tomorrow we can make a settlement.'

"Q. Now what have you to say as to the disposition of the cash from—after the 22nd day of August of 1902 up to the 6th and including the 6th day of September, 1902?

"A. That is one of the instances where Mr. Wright told me to hold over the cash, and he kept putting it off until the day he was suspended.

"Q. What day was that?

"A. I guess on the 8th of September.

"Q. During that period of time from August 22nd to September 6th, where did you keep the money?

"A. In my private drawer.

"Q. And where was that?

"A. In the safe where we keep the books.

"Q. Who had access to this safe where you kept the books?

"A. I did.

"Q. Anyone else that you know of?

"A. No sir.

"Q. Only yourself?

"A. Yes sir.

"Q. When the cash wouldn't be turned over in the evening but would be kept by you by orders of the defendant until the day following, what would be done, what was eventually done with the cash? I am not speaking of the cash from August 22nd now, 1902, but before that time, when he would not receive it in the evenings?

"A. You mean when he makes a settlement?

"Q. Yes, how did he do; what would be done?

"A. Well, whenever Mr. Wright calls for the cash that I have I would turn it over, and him and I go over it and then it is verified with the bookkeeper's figures.

"Q. And what disposition would Mr. Wright—would the defendant make of the cash after he would receive it?

"A. Take it and put it in his safe.

"Q. You say the last time that the defendant took the cash was August 22nd, 1902?

"A. Yes sir." (pp. 26-27 *Ib.*)

In *White v. U. S.*, 164 U. S. 10, the court admitted entries kept by a jailer although not required by statute.

"It was not necessary that a statute of Alabama should provide for the keeping of such a book. A jailer of a county jail

is a public officer, and the book kept by him was one kept by him in his capacity as such officer and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty, is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the office would seem to require it. In that case the entries are competent evidence."

For the considerations above expressed, the exception to the admission of the books in question is overruled.

The defendant excepted to the refusal of the court to allow in cross-examination of a witness to defendant's signature the question whether the witness had compared the alleged signature with other entries of the defendant.

The alleged signature was upon the check of the Hawaiian Electric Company and also upon a receipt to that company purporting to have been signed by defendant, and reading as follows:

"Honolulu, Aug. 15, 1902.

"Received of the Hawaiian Electric Co., Ltd., Thirty-two hundred eighty-nine and 53-100 Dollars.

"B. H. Wright,
"Chief Clerk."

The following extract from the transcript of evidence, pages 101, 102, shows what occurred:

"Mr. Cathcart.

"Q. Mr. Siemsen, I show you Exhibit 17. Mr. Siemsen, I ask you if you are familiar with the handwriting of the defendant B. H. Wright?"

"A. I am.

"Q. I ask you to look on the endorsement on that check and state whether or not it is—state whose the signature is?

"Mr. Davis. If your Honor please, the mere fact that he simply asked the question, 'Are you familiar with the handwriting' and stops there, does not qualify a witness to answer. We want to know how he is familiar.

"The Court:

"Q. How did you become familiar with his handwriting?

"A. Well, I have seen him write quite often and I have seen him sign his signature quite often and seen him writing.

"The Court. That is sufficient. Now you can ask the question.

"Mr. Cathcart.

"Q. Whose signature is that?"

"A. Mr. Wright, B. H. Wright.

"Q. The defendant?"

"A. Yes sir.

"Q. Look at the signature on the bottom of that voucher there. Can you state whose signature that is?"

"A. B. H. Wright.

"Q. The defendant?"

"A. Yes sir.

"Mr. Cathcart. I will offer it in evidence.

"Mr. Davis. I object. I want to cross-examine before it goes in.

"Q. Did you ever compare that; did you ever compare that writing with any writing of B. H. Wright's?"

"Mr. Cathcart. I object to that as not cross-examination.

"The Court. Objection sustained.

"Mr. Davis. I except.

"Q. You didn't see B. H. Wright write that?"

"A. No sir.

"Q. How many times have you seen him write?"

"A. I don't know."

Cross-examination of the witness was continued at considerable length.

If the defendant's object in asking the question was to show that the witness was not qualified to testify whether the signature was genuine, the court could have allowed the question or not as in its discretion it thought fit. If his object was to test the correctness of the witness' evidence that the signature was that of the defendant the question was proper cross-examination. We cannot, however, say that its exclusion was prejudicial to the defendant or was reversible error, the defendant having substantially admitted the receipt of the money.

The following is the substance of other exceptions taken by the defendant namely:

On the evidence of the witness James H. Boyd called for the prosecution, defendant took eight exceptions, viz.: calling him

as witness he having been indicted as they said on the same matter; to his testifying as to the appointment he gave the defendant as chief clerk and his appointment as clerk of the market and his reading the appointments himself instead of having the clerk of the court read them; to his testifying what the defendant's duties were; to refusal to strike out his evidence that the defendant kept the cash in the office in a safe and there was a combination safe there of which the defendant had the combination and that he pointed out his duties in the office to the defendant.

In the evidence of Siemsen, the second witness for the prosecution, the defendant took seven exceptions, namely:

To the evidence that the witness was in charge of the window at the office, receiving money and giving receipts and under defendant's instructions, and that defendant told him of his duties in regard to receiving money; that witness kept a stub book of receipts turning the cash regularly over to the defendant each day, that on days that the defendant did not care to open the safe witness locked it up in his own drawer; to the witness using memoranda to refresh his memory as to the amount of cash that he had on hand on the day that the defendant opened the safe; to his evidence concerning interview between the defendant and the other officials already referred to.

In the evidence of Cook, the third witness for the prosecution, defendant took thirteen exceptions, namely:

To the witness testifying concerning the conversation between defendant and W. H. Wright already alluded to; to the defendant sealing the combination safe; to witness testifying concerning a cash receipt book kept by him in the office called an auxiliary book and to the introduction of the book in evidence; to his showing the cash balance called for by the books September 1, 1902, or filing a statement taken from the books which was passed over to the treasurer according to the practice every month which statement dated September 2, 1902, signed by the defendant, showed "Receipts Department of Public Works for the Month ending August 31, 1902"; to the witness testifying

that there was no entry in the auxiliary book of any money received from August 1 up to and including September 8, 1902, from the Hawaiian Electric Company; to the refusal of the court to allow the defendant in cross-examining this witness to ask him, if he knew whether the defendant took any oath of office, or gave any bond.

In the evidence of Meyers, deputy auditor, for the prosecution there were five exceptions taken by the defendant, namely:

To the witness testifying whether he had authorized any sets of books to be kept in the office of the Superintendent of Public Works; and whether a system of keeping them was approved by the treasurer and his testimony on that subject; to his testifying concerning the last schedule filed in his office by the defendant, showing statement of receipts and to the introduction in evidence of the schedule referred to.

In the evidence of White for the prosecution defendant excepted to his testimony concerning a contract between a former Minister of Interior and the Hawaiian Electric Company, Limited.

Defendant excepted to the evidence of Gartley for the prosecution that the check already referred to was drawn in payment of a royalty on cash receipts for light and power for one year to June 1, 1901, under the contract above mentioned.

Siemsen being recalled by the prosecution, eight exceptions were taken by the defendant in his evidence, namely:

The exception already referred to about cross-examining this witness to defendant's handwriting; to the introduction of the voucher and check signed by the defendant as testified by the witness; to the witness testifying that the defendant had not turned over to him any money collected from the Hawaiian Electric Company at any time after August 1.

Defendant excepted to the refusal of the court to instruct the jury to find a verdict of not guilty on the grounds that there was no evidence of embezzlement and also that the statute on which the prosecution is based "permits imprisonment for life and involves a cruel, unusual, unreasonable and excessive pun-

ishment." The sentence was imprisonment at hard labor for three years with costs.

None of the above exceptions can be sustained; although discussed at considerable length in their brief, defendant's counsel did not, except as herein mentioned, rely upon them in oral argument. No error appears in the instructions to which the defendant excepted, or in the refusal to give those which were asked and not given. The motion for a new trial was properly denied.

Exceptions overruled, and case remanded to the First Circuit Court.

L. Andrews, Attorney-General, Cathcart & Milverton for prosecution.

J. J. Dunne, G. A. Davis and Smith & Lewis for defendant.

KAPIOLANI ESTATE, LIMITED, *v.* L. A. THURSTON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 3, 1904. DECIDED OCTOBER 7, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

A bill of exceptions cannot be amended by incorporating therein entirely new exceptions after the time prescribed by statute for incorporating the exceptions in the bill, even though it may be amended so as to make exceptions previously incorporated therein available.

OPINION OF THE COURT BY FREAR, C.J.

The defendant moves that the record be remitted to the Circuit Court in order that he may apply there for an amendment of his bill of exceptions, and that the case be continued in this court until the amendment is made and the record returned.

The case was tried September 8, 1903. Judgment was entered September 24, 1904. A motion for a new trial was made September 25, 1903. That was denied. The bill of exceptions, containing sixteen exceptions relative to the admission or rejection of evidence, was filed and allowed March 21, 1904, an extension of time having been obtained as permitted in the statute. The motion now made was filed August 26, 1904. The amendment proposed is the insertion of an exception to the admission of certain evidence, an exception to the refusal to give certain instructions and to the giving of certain other instructions, an exception to the verdict and an exception to the overruling of the motion for a new trial. Affidavits are filed to show that a page which had been prepared containing these exceptions was omitted by mistake from the bill as presented to and allowed by the judge and from the copy served on opposing counsel.

The statute as amended (Laws of 1903, Act 32, Sec. 18) requires exceptions, for the purposes of review on exceptions in this court, to be incorporated in a bill of exceptions and presented to the judge within twenty days after final judgment or such further time as may be allowed by the judge. It is obvious that the exceptions in question can not now be incorporated in a bill or presented or allowed within the time limited, for the twenty days have elapsed and "further time" has not been allowed and is not now allowable. *Kapiolani Estate v. Peck*, 14 Haw. 580.

The statute on amendments as amended (Laws of 1903, Act 78) is, it is true, very liberal. It permits amendments "at the trial or on appeal, or at any other stage, before or after judgment" not only "of any petition or pleading or process" but of any "proceeding," in certain enumerated ways "or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceeding to the facts proved." But does it permit amendments of bills of exceptions by incorporating therein entirely new exceptions? If so, it is in direct

conflict with the statute above referred to which requires the exceptions, in order to be thus considered by this court, to be incorporated in the bill within a specified time, which has now elapsed. Authorities elsewhere are somewhat divided as to the extent to which bills of exceptions may be amended after the expiration of the time allowed by law for filing them. The Supreme Court of the United States takes a rather strict view. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293. Our own court has taken the view, which is held by many other courts, that a bill of exceptions may be amended in such a way as to make the exceptions already incorporated available, as by making the transcript of the evidence a part of the bill by reference thereto. *Magoon v. Ahmi*, 11 Haw. 233. That, however, is very different from allowing entirely new exceptions to be incorporated in the bill. The object of an amendment is to perfect what already exists in an imperfect state, not to create or originate something entirely new. The statute on amendments carries out this idea, for it allows the insertion of allegations material to the case, that is, the case already presented, and contemplates that the amendment shall not substantially change the claim or defense. A bill of exceptions can not after the time limited be amended by incorporating entirely new exceptions, so as to make a different case for this court, although it may be amended to a greater or less extent so as to make available the exceptions incorporated in it within the prescribed time.

Since the proposed amendment could not properly be made if the record should be remitted to the trial court, the motion to remit the record and continue the case until the record is returned is denied.

Kinney, McClanahan & Cooper and S. H. Derby for plaintiff.
Castle & Withington for defendant.

ELIZABETH K. PRATT *v.* Y. AHIN and YEE NAM,
PARTNERS UNDER THE FIRM NAME OF Y.
AHIN COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 3, 1904. DECIDED OCTOBER 17, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

LEASE.

Assignment of lease by consent of lessor, followed by acceptance of rent from the assignee, does not release the lessee from its covenant to pay rent, although the lease did not prohibit assignment, and the assignee was a partner in the lessee's firm.

VERDICT.

A verdict "for the plaintiff for \$330. and interest at six per cent." is not invalid for uncertainty in an action of covenant for non-payment of rent payable in semi-annual installments, fixing the date from which to compute interest.

QUESTION—*of fact for jury.*

Defence of payment is a question of fact for the jury, concerning which no question of law is raised by a general exception to the verdict as contrary to law and evidence.

OPINION OF THE COURT BY HARTWELL, J.

The case presents but one exception, namely, that the verdict was contrary to the law and evidence.

The action was for \$330., rent due, according to the terms of the lease, in five semi-annual installments beginning with June 1, 1900, less \$45. paid on account of the first installment, "together with interest on each installment so in default to the present date." The declaration contained a prayer for judg-

ment for said sum of \$330. "with legal interest thereon to the date of recovery of such judgment and for costs of suit." The answer of the defendant Ahin denies that he was ever a partner of Yee Nam, or that Yee Nam was a party to the lease, while admitting the lease between plaintiff and Y. Ahin Company. The answer further avers that by the plaintiff's written permission he transferred the lease October 30, 1899, from Y. Ahin Company, the original lessee, to Yee Chan, and that at the date of the transfer the rent was paid in full; also averring that by the terms of the transfer he reserved no interest, and is not liable for any rents since accrued, and is in no way indebted to plaintiff. An amended answer was filed by Ahin, in which he denied all the allegations in the declaration. The assignment of the lease by the Y. Ahin Company to Yee Chan, October 30, 1899, was placed in evidence. The evidence of the plaintiff was that Yee Nam told the plaintiff's attorney, C. W. Ashford, that he was a partner with Y. Ahin in the original lease; that his real name was Yee Nam; that his business name was Yee Chan. The jury found "for the plaintiff in the sum of \$330., together with interest thereon at the rate of six per cent."

The defendant's first contention, as presented in the brief of its counsel, is that "the verdict is too uncertain on which to base a judgment" in omitting to state a time for which the interest is to run.

The two cases cited to sustain this view, *Lashua v. Markham*, 21 R. I. 492, and *Meeker v. Gardella*, 23 Pac. Rep. 837, were actions for unliquidated damages. In the former case the jury rendered a verdict for the plaintiff for "\$125. with interest at six per cent.," and in the latter case the jury found "for the plaintiff and assessed the damages at \$3,050. and legal interest." The court held the verdict in each case to be bad for uncertainty, in the one case saying that the "verdict in respect to interest is too uncertain for computation because it does not state the time for which the interest is to run," and saying in the other case that the verdict "would not sustain a judgment for any sum whatever except by treating the words 'and legal interest' as

surplusage." The present case is an action for a sum certain, fixed by a written instrument, to wit, the lease which names the dates when the installments of rent are payable by its terms. There is no difficulty in computing the interest on those sums from the date when they respectively became payable under the lease, as set forth in the declaration.

The verdict can not be set aside for uncertainty on this matter of interest.

The defendant further contends that the assignment of the lease by consent of the lessor, and the acceptance from the assignee of the lease of the rent thereafter accruing, amounts to a waiver of the defendant's covenant to pay the rent, or to a surrender of the lease, showing the lessor's intent to substitute the assignee for the original lessee.

The mere assignment by the lessee of his estate under the lease, and the acceptance by the lessor of rent from the assignee does not constitute in law a waiver of the lessee's covenant to pay rent, or a surrender of the term. The law upon this subject is not affected either by the fact that the lessor's consent was not required for the assignment, or that the assignment was made to the co-lessee.

If there were waiver by conduct, it would be a matter for the jury, and not for the court to pass upon. The verdict in this case is conclusive on this matter.

The defendant raised no question of law at the trial, and none is presented by the general exception to the verdict, there being evidence on which it can be sustained.

The same is true of the defendant's claim that the verdict is erroneous because the evidence showed a payment of \$150. to the plaintiff's agent. This was a matter of fact for the jury, no question of law having been raised thereon, and it is concluded by the verdict, the agent in her evidence having denied the payment. Exceptions overruled and case remanded to the First Circuit Court.

C. W. Ashford for plaintiff.

Castle & Withington for defendant.

JONAH K. KALANIANAOLE v. W. W. DIMOND & COMPANY, LIMITED.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 3, 1904. DECIDED OCTOBER 17, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

DEFAULT—*judgment on, not appealable.*

A judgment by default made by a district magistrate is not appealable under the statute, C. L., Sec. 1430, providing that "appeals shall be allowed from all decisions of district magistrates in all matters, whether civil or criminal."

Luce v. Chin Wa, 5 Haw. 629 (1886), holding that such judgment is not appealable under the statute then in force providing that "any party deeming himself aggrieved by the decision of any police or district justice in any case, whether civil or criminal, may appeal" held to govern in the present case, there being no distinction in effect between the statutes.

OPINION OF THE COURT BY HARTWELL, J.

This is a writ of error to the First Circuit Court, assigning as error the order of the court in dismissing an appeal taken by the plaintiff-in-error from a judgment by default made against him by the district magistrate of Honolulu.

This court held in *Luce v. Chin Wa*, 5 Haw. 629 (1886), that an appeal did not lie from a judgment by default.

The statute in force at that time was that "any party deeming himself aggrieved by the decision of any police or district justice in any case, whether civil or criminal, may appeal," etc. We see no distinction between the wording of that statute and

that of the statute now in force as amended by Section 68 of Chapter 57 of the Laws of 1892, and reading that "appeals shall be allowed from all decisions of district magistrates in all matters, whether civil or criminal."

In order, therefore, to hold that the dismissal of the appeal by the Circuit Court was erroneous in this case, it would be necessary to overrule the decision in *Luce v. Chin Wa*. We are not prepared to do this. As stated by the court in that case, "The reasons, if any exist, for the removal of a default should be presented to the court which has ordered it."

The writ is dismissed and the case remanded to the First Circuit Court.

C. W. Ashford and C. A. Long, attorneys for plaintiff-in-error.
Thayer & Hemenway, attorneys for defendant-in-error.

MAGGIE FISHER *v.* KEUKAHI WAILEHUA and J.
ALFRED MAGOON.

APPEAL FROM DE BOLT, CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 5, 1904.

DECIDED OCTOBER 17, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

DEED—uncertainty.

A deed conveying fifty acres out of a larger tract, or tracts, but not attempting to locate the parcel conveyed, takes effect as a conveyance of an undivided interest in the whole land, and is not void for uncertainty. The interest conveyed is in the proportion that the number of acres conveyed bears to the number of acres in the whole land.

OPINION OF THE COURT BY HATCH, J.

This is an appeal in equity from the First Circuit. The plaintiff, Maggie Fisher, brought her bill in equity for partition of land and accounting against defendants Keukahi Wailehua, alleged to be a co-owner with the plaintiff, and J. Alfred Magoon, mortgagee; the land claimed to be held in common being all the land situated at Koolaupoko, Island of Oahu, described in Grant No. 1106, less a parcel containing 101 acres sold before the date of plaintiff's deed. The parties both claim under voluntary conveyances from Keleau, the grandmother of plaintiff and mother of defendant, Keukahi Wailehua. The deed to the plaintiff is dated April 11, 1890, and conveys to her "fifty acres within the piece of land situated at Kailua, Koolaupoko, Oahu, as seen in the name of Kokahe, Royal Patent Number 1106. Forever conveying the fifty (50) acres with all rights and privileges appertaining thereto to Maggie Fisher, her heirs, representatives and assigns forever." The deed under which defendants claim is dated January 19, 1892. It conveys "all that piece of land situated at Kailua, Koolaupoko, Oahu, and being the land described in Royal Patent Number 1106 in the name of Kokahe, my father, and within the piece of land which I am conveying are two hundred (200) acres, more or less, being the remainder of those pieces sold previously to this conveyance." The mortgage under which defendant Magoon claims is dated February 24, 1900, and was given to secure the sum of \$750.

Royal Patent 1106 (Grant) conveys four parcels of land containing in all 303 acres. In the granting portion, however, the land is referred to as "all that tract of land," etc. A similar form of expression, in the singular number, appears in the deeds of both plaintiff and defendant, although all the land in the Patent is affected in both cases.

It is contended by defendants that the deed to plaintiff is void for uncertainty in that it does not locate or describe the land conveyed; and that it would be contrary to the grantor's intention

to construe the deed as a conveyance of an undivided interest in the entire tract. It is further claimed that Keleau by her deed to Keukohi actually conveyed to defendant Keukahi all of the three lots out of which plaintiff claims the conveyance to her of fifty acres; and that the deed to plaintiff attempted to convey fifty acres in the four lots, one of which had been previously sold; that is, that it was a conveyance of fifty acres out of 303, the area of the entire land named in the patent.

There is no ground to support the latter contention. It was not necessary for plaintiff's grantor to state in her deed the number of acres remaining to her, or the number belonging to her at the date of the deed. There is no misstatement in the deed to plaintiff. There is nothing on which to base an argument that the plaintiff's grantor at the time of making the deed to her was ignorant of the fact of the former conveyance, or had forgotten it, or made the deed of plaintiff under a mistake of fact. There was no occasion whatever for plaintiff's grantor to mention previous conveyances. No inference therefore hostile to plaintiff's deed can be drawn from such silence. No matter how many prior conveyances plaintiff's grantor might have made, the deed to plaintiff would operate against the land remaining at the time of its execution. It is also immaterial whether the grantor knew that her deed would operate as the conveyance of an undivided interest. We have to seek the grantor's intention only as it appears in the deed itself. The fact that grantor subsequently in her deed to defendant Keukahi ignored the existence of the deed to plaintiff, and recited the area as it would have been if the deed to plaintiff had never been made, can have no bearing in the case. Extraneous facts can not be imported into plaintiff's deed to affect its certainty. The question of certainty must be determined from what is found in the deed itself.

Upon the main contention that the deed to plaintiff is void for uncertainty we are of opinion that it is not void, but that it operates as a conveyance of an undivided interest in the land held by the grantor at its date. The law is well settled that a deed conveying a part of a larger tract, but not locating the part con-

veyed, should be so construed. In Devlin on Deeds, Sec. 1019, the rule is laid down as follows: "Where a deed is executed of a given quantity of land, parcel of a larger tract, but the deed fails to locate the quantity so conveyed by a sufficient description, the grantee, on delivery of the deed, becomes interested in all the lands embraced in the larger area as tenant in common with his grantor; and as such tenant the grantee can claim a partition under proceedings instituted for that purpose, or alternatively, a partition may be made by amicable agreement between the parties."

This statement of the law by Devlin is quoted literally from *Schenck v. Evoy*, 24 Cal. 104, and is fully supported by the following cases: *Lawrence v. Ballou*, 37 Cal. 518; *Wallace v. Miller*, 52 Cal. 655; *Great Falls Co. v. Worcester*, 15 N. H. 412; *Jackson v. Livingston*, 7 Wend. 136; *Dahoney v. Womack*, 20 S. W. 950; *Lennartz v. McCulloch*, 27 S. W. 279. The defendants cite some cases to the contrary. *Loflin v. Herrington et al.*, 16 Ill. 303, and the other cases from Illinois support defendants' contention, as does *Bosworth v. Allen*, 3 Iowa 84. *Plenney v. Ferrill*, 55 Miss. 41, 11 So. 6, holds a deed for one-half of a given tract void because it did not specify which half. This is an extreme case and goes too far to be persuasive. It appears to be opposed to the great weight of authority. The same comment may be made upon *Mutual Building & Loan Assn. v. Wyeih*, 17 So. 45, an Alabama case. Here it was held that a deed of two-thirds of a tract of land was void because it did not specify which two-thirds. The remaining cases cited by defendants do not appear to be in point.

In *Adams v. Edgerton*, 35 Ark. 470, the description called for three-fourths of the south part of the N. W. quarter of Sec. 30, etc. The attempt to locate the grant in the south part of the main tract was nugatory. It brings the case within the rule laid down by Devlin. In *Munson v. Munson*, 30 Conn. 425, the attempt was to set off \$500. worth of land. In *Meeker v. Meeker*, 16 Conn. 403, also, the description was made to depend in part on value. In *Shoemaker v. McGonigle*, 86 Ind. 421, the

description was "*the southeast part of the southwest fourth,*" etc., containing thirty-two acres. This puts this case on the same footing as *Adams v. Edgerton*. In *Huntress v. Portwood*, 42 S. E. 513, the deed failed from an attempted location which was not sufficiently specific to identify the land.

Thus the great weight of authority supports the statement of law made by Devlin. We hold accordingly that the deed to plaintiff takes effect by giving to plaintiff an undivided interest in all the land in Royal Patent 1106 owned by Keleau, plaintiff's grantor, at the date of her deed to plaintiff, to wit.: in the proportion that fifty acres bears to two hundred and two acres. Having arrived at the conclusion that plaintiff has an undivided interest in the land in question, there is no difficulty in holding that the undivided interest extends to all the different parcels comprising the land in Royal Patent 1106 remaining at the time of plaintiff's deed. No attempt having been made to locate the fifty acres in plaintiff's deed, we fail to see that any additional element of uncertainty is introduced from the fact that the land in the grant in question comprises different parcels.

The appeal is dismissed and the case remanded to the Circuit Judge for the First Circuit for further proceedings in accordance with the opinion. Plaintiff is allowed costs.

E. M. Watson for plaintiff.

J. Alfred Magoon, J. Lightfoot for defendant *J. Alfred Magoon*.

IN THE MATTER OF THE ESTATE OF AUGUST
KRAFT, DECEASED.

APPEAL FROM DE BOLT, CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 6, 1904.

DECIDED OCTOBER 17, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

COMMISSIONS—*of administrators.*

Administrators are not to be allowed commissions on chattels delivered in kind to an heir or legatee. *In re Molteno*, 3 Haw. 288, followed.

CONVERSION—*election.*

Commissions are not to be allowed an administrator with the will annexed where a will has directed the sale of real estate, but before the sale has actually taken place, the devisees, having the entire beneficial interest, have elected to take the land in place of the proceeds of the same. An actual conversion into money must have occurred to authorize the allowance of commissions under the statute.

OPINION OF THE COURT BY HATCH, J.

This is an appeal from a Circuit Judge of the First Circuit Court sitting in Probate, in the matter of the will of August Kraft, deceased.

August Kraft died in Honolulu on August 3, 1900, leaving a will which was duly admitted to probate on the 14th day of January, 1901. The executors named in the will having resigned, W. L. Howard, the appellant, was appointed administrator with the will annexed. By the second paragraph of the will, all real and personal property of the testator is divided

equally among his children, naming them, and a direction is given that his real estate, situated on Lunalilo street in Honolulu, should be sold at public auction, unless purchased by one of the testator's sons. The sale of the real estate was duly advertised by the administrator, but no purchaser was obtained. Thereupon, on the 25th day of September, 1903, the legatees named in the will filed an election to take the real estate directed by the will to be sold in lieu of the proceeds of sale. On the 27th day of October, 1903, the legatees filed a similar election to take certain chattels in lieu of the proceeds of sale. The administrator with the will annexed filed his final accounts on November 13, 1903. He therein credited himself with the sum of \$707.74, being five per cent. commission on the sum of \$14,154.75, the appraised value of the real and personal property elected to be taken by the legatees in lieu of the proceeds of sale of the same. On the objection made on behalf of the legatees to the allowance of this item, it was disallowed by the Circuit Judge, and the administrator was surcharged with the amount above named. From this decree the present appeal was taken.

Two questions are raised on the appeal, namely, the administrator's right to commissions on the chattels, and his right to commissions on the real estate. The statute provides as follows:

"Fees of Executors, Administrators and Guardians:—Executors, administrators and guardians shall be allowed the following commissions upon all moneys received and accounted for by them, that is to say:

"Upon all moneys received representing the estate at the time of the institution of the trust, such as cash in hand and moneys realized from securities, investments, and from sales of real estate and personal property other than interest, rents, dividends and other profits coming due after the inception of the trust, two and one-half per centum. Upon the final payment thereof or any part thereof, two and one-half per centum." C. L. 1897, Sec. 1493.

As far as the personal property is concerned, the law in this Territory is settled by the case *In re Molleno*, 3 Haw. 288. It is

there held that administrators are not to be allowed commissions on specific chattels delivered in kind. This was affirmed in the case of *Estate of Long*, 7 Haw. 368. This rule has been settled law in this jurisdiction for thirty years, and we see no reason for now departing from it. It is true, the statute in force at the time *In re Molteno* was decided differed in some respects from that now existing. The points of difference, however, are immaterial to the present question. It is urged that we should reverse *In re Molteno* and follow the rule adopted in more recent cases in New York, and in some other States. The decisions in the different States are not uniform. Their statutes upon this subject differ in so many respects from ours that little aid can be gained from a consideration of the cases upon those statutes in any question of construction of our own statutes. Aside from this, however, we consider that where a rule has prevailed for so long a time in our own courts, it should not be departed from unless a very conclusive case is made out for the adoption of a new rule. The statute is clear and positive in its terms, and scarcely allows room for difference of opinion in the construction of the same. No sufficient showing has been made to warrant the adoption of a new rule.

We think that a similar rule should be followed in regard to the real estate. It has been urged by appellant that the doctrine of conversion applies. Unquestionably the equitable doctrine of conversion in certain circumstances requires real estate to be treated as personal property; also the proceeds from the sale of real estate should at times be made to retain the character of real estate. This may occur in consequence of the provisions of a will, or to preserve equities, or in cases where, by the statute of descents, real and personal property follow different channels. The basis of the doctrine of conversion depends upon an application of the rule that in equity all things directed to be done are treated as done. This has no application to a consideration of an administrator's right to commissions, in which the statute governs, and in which the administrator's allowance must

depend upon acts actually done by him. The statute provides that the administrator shall be allowed commissions only upon moneys received and accounted for by him. The court has no authority to enlarge this statute, nor to make an allowance in any other case than is therein provided. No actual conversion of property took place. The legatees, by filing their election to accept the real estate in lieu of cash, put an end to the power of the administrator in the premises. This the legatees had the undoubted right to do at any time. The law is well settled that devisees under a will, having an absolute and vested right in the proceeds of a sale of land directed to be sold under a power given to executors, may at any time before the power of sale is executed, elect to take the land instead of its proceeds, according to their respective interests in the latter, and thus prevent a sale. *Trask v. Sturgis*, 170 N. Y. 482; *Mandlebaum v. McDonnell*, 29 Mich. 77; *Fluke v. Fluke*, 16 N. J. Eq. 478; *Ridgway v. Underwood*, 67 Ill. 419; *Patterson's Ap.*, 6 Atlantic 759.

The administrator with the will annexed had, under the will, only a naked power of sale. The title to the real estate was in the devisees named in the will. The power of sale having been absolutely extinguished by the action of the devisees, and no sale in fact having taken place, and the administrator with the will annexed not having in fact received any moneys from the sale of said real estate, the narrow question remains between him and the devisees whether or not commissions can be allowed under these circumstances, under our statute. Upon this point the statute leaves no room for the application of the doctrine of constructive conversion. As before stated, the right of the administrator to commissions depends upon acts actually done by him; the actual collection and disbursement of cash. It would appear reasonable that an executor in cases like the present should receive some compensation for services both in the care of the real estate and in preparing for a sale. The court, however, is without authority to make an allowance. The only remedy is through the Legislature by an amendment of the statute.

The appeal is dismissed and the case remanded to the Circuit Judge for the First Circuit having jurisdiction of the same.

Philip Weaver for the administrator.

Thayer & Hemenway for the devisees.

LUM AH LEE, LUM YUEN SING, LUM AH SAM, LUM YET, LUM KUM, LUM LOY, TONG KIT, WAI SUNG, MAN LUM and LUM SING, DOING BUSINESS AS COPARTNERS UNDER THE FIRM NAME OF SEE YICK WAI COMPANY v. AH SOONG, TING SING, WONG GONG AND FONG YUEK.

APPEAL FROM ROBINSON, CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 8, 1904.

DECIDED OCTOBER 18, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

WATER—*illegal diversion.*

Damage to taro crop caused by defendants' illegal diversion of water held properly assessed to defendants, although a drouth was the cause of partial failure of crop, allowance having been made in the award for the proportion of loss caused by the drouth upon other taro crops in the vicinity.

DAMAGES—*certainty as to cause and amount of.*

An award by the trial judge of damages to crops from illegal diversion of water not set aside by reason of evidence that either plaintiffs or third parties had tightened upper dams, thereby decreasing the flow of water in the ditch by which plaintiffs' land was irrigated, there being no evidence of any appreciable injury resulting thereby to plaintiffs' crop, or that the dams were illegally tightened.

BURDEN OF PROOF.

The burden in such case is on the defendants to show an appreciable effect upon the damage caused which resulted from the acts of the plaintiffs or of third parties, and also that those acts, which consisted in tightening the upper dams, were illegal.

OPINION OF THE COURT BY HARTWELL, J.

This is an appeal from a decree made by the Third Judge of the First Circuit Court at chambers, perpetually enjoining the defendants from obstructing, interfering with or decreasing in volume the water flowing over a certain dam in Manoa stream called the Paaluhi dam, or in any manner obstructing, interfering with or decreasing in volume the water used in supplying the lands of the complainants on the Ewa side of said stream flowing in the ditch from the dam known as the Bishop dam, and described in the plaintiffs' bill of complaint, and also awarding to the plaintiffs damages in the sum of \$1,700., "resulting to and sustained by the said complainants by reason of the unlawful acts of said respondents in trespassing upon said land, and in obstructing and interfering with and decreasing in volume the water flowing over said Paaluhi dam through said ditch, together with costs in the further sum of \$55.50; which said several sums are hereby assessed against the said Ah Soong, Ting Sing, Wong Gong and Fong Yuck, jointly and each of them severally."

At the first hearing on the bill before Silliman, J., at chambers, a decree was made dismissing the bill. On appeal therefrom this court reversed that decree and remanded the case to the Circuit Judge of the First Judicial Circuit, to ascertain the amount of damage suffered by the complainants in consequence of the respondents' wrongful acts, and to enter a decree in accordance with his findings thereon and in conformity with the views expressed by this court in its decision. 13 Haw. 378.

It is contended by the defendants "that the testimony for the plaintiffs does not meet the rule requiring a reasonable certainty in the proof of damages;" that the evidence shows three

distinct causes of loss in addition to the acts of the defendants, namely: "(1) the act of God; (2) the acts of the plaintiffs; and (3) the acts of third parties;" that the extent of the loss from the natural cause of drouth was unsupported by any evidence, although fixed by the circuit judge at one-fourth of the total loss; that the judge made no allowance for loss from the plaintiffs' own acts, and that the extent of that loss was incapable of ascertainment; and that the same was true of the damage caused by the acts of third parties. The following citations were made in support of this contention: *Wakeman v. Mfg. Co.*, 101 N. Y. 205; *Selden v. Cashman*, 20 Cal. 57.

The New York case was an action for damages for breach of an agreement by which the defendants were to furnish sewing machines for sale in Mexico, giving the plaintiffs the sole agency for the sale. The plaintiffs had sold fifty machines and sent the order to the defendants for them, which order was filled, but the defendants refused to fill a second order of the plaintiffs for fifty machines. The plaintiffs showed a profit which they could have made of \$4.00 on a machine, and the damages were limited by the trial judge to the loss of profits on the machines which they ordered. The plaintiffs claimed damages for a total breach of the agreement. The appellate court, while saying that damages which were merely speculative and imaginary could not be recovered, held that in this case the defendants had a right to establish agencies for the sale of their machines, which agencies could not be broken up at the will of the defendants without default of the plaintiffs; that the agreement had value to the plaintiffs, of which they had been deprived by the defendants, and that while that value was uncertain and difficult to estimate, the plaintiffs "should not have been deprived of the damages which they made to appear because they could not make clear the full amount of their damages. All the facts should have been submitted to the jury with proper instructions, and their verdict, not based upon mere speculation and possibilities but, upon the facts and circumstances proved, would have approached as near the proper measure of justice as the nature

of the case and the infirmity which attaches to the administration of the law will admit. In 1 Sutherland on Damages, 113, it is said: 'If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired, and to show the whole situation which is the foundation of the claim and expectation of profits so far as any detail offered has a legal tendency to support such claim.' "

Selden v. Cashman, above cited, was an action for wrongful levy, in which the plaintiff claimed that during the levy his store was closed and his business stopped. He claimed damages for loss done to his business and to his credit, and for the diminution of profits of his trade during the levy. The court held that damages for loss of profits which the plaintiff might have made were too remote and contingent to be allowed, and that "the right of recovery is necessarily limited to such damages as are susceptible of computation." The facts in that case have no parallel in those of the present case.

The extract above cited, however, in the New York case from Sutherland states correctly the rule of law, which entitles an injured party to submit to the jury "the particular facts which have transpired," etc. This view is illustrated in *Merritt v. Brinkerhoff*, 17 Johnson 306, which was an action on the case brought by several owners of mill seats on a stream against the owner of a mill above for damage resulting to the plaintiffs from the defendant's stopping the natural flow of the stream, shutting his gate and detaining the water for an unreasonable time, or letting it out in such unusual quantities as to prevent the plaintiffs from using it. During the time in which the injury was alleged to have been caused, it was shown that there was a very severe drouth, but it was testified that there was enough water to turn the mills if the defendant had not stopped the water in his dam. There was, however, considerable diversity of opinion among the witnesses on this subject. The judge charged the jury that the question whether the injury resulted from the defendant's acts or by reason of the drouth was a question

for them to decide. This instruction was sustained by the appellate court.

The further contention of the defendants is that the amount of the damages awarded by the Circuit Judge was based on no evidence on which the net value of the last crop was legally determinable.

In considering this two-fold defense, that neither the reasonable cause of the damage, nor its extent, was legally shown, we have carefully examined the record of testimony, and are of the opinion that there was legal evidence on which the award was based. This court having in its former decision held that the case showed that the defendants had infringed upon the plaintiffs' legal rights, and that the plaintiffs' taro crops had thereby become diminished in value, the credibility of the testimony concerning the extent of the loss, so far as it legally tended to show such loss, was for the judge to whom it was presented to pass upon. The evidence of the extent of the loss caused by the drouth upon other taro crops in the immediate vicinity was competent to show the extent to which the plaintiffs' crops suffered from the same cause, and the finding of the judge that one-fourth of the loss was so caused was supported by the testimony.

As to the defendants' claim that the plaintiffs' acts in tightening the dams above had caused the loss, the judge in his decision says: "There was some testimony tending to show that the complainants were themselves responsible for the lack of water in Manoa stream, below Paaluhi dam, at least to some extent by reason of their own acts in tightening dams in said stream above said dam supplying an auwai through which other lands owned or leased by complainants were watered, but I am satisfied that such acts of complainants resulted in merely an inconsequential loss of water, so inconsequential in fact as not to contribute in a material degree to the damages sustained by them upon the lands in question in this suit."

We see no reason for reversing this finding. There is no evidence to show the extent of loss thereby occasioned, which defendants' attorneys in their brief say was "incapable of ascer-

tainment, and only renders more uncertain the loss chargeable to defendants." If there was no appreciable damage so caused it was properly disregarded; if appreciable, it could have been estimated. The plaintiffs ought not to be deprived of their right to recover damages for their losses if it were true that some unascertainable part of their loss was caused by their own act. Aside from the improbability that they would have lessened the water supply for their lower lands, it is not clear from the evidence that they did so. Moreover, the burden was on the defendants to show what if any loss resulted from extraneous causes.

The defendants' claim that third parties contributed to the plaintiffs' loss by withdrawing water which otherwise would have gone to the plaintiffs' land was a matter to be determined on the evidence, the burden still being on the defendants to show the same with reasonable approximation. There is no evidence that those who tightened the dams above the Paaluhi dam acted illegally or without right. The judge's finding is not to be set aside on this ground.

The defendants further say, citing from their brief: "If damages are allowable in this case, the measure would be the net value of the taro destroyed in consequence of the illegal acts of the defendants and as the proximate result thereof;" that "the testimony shows that the drouth began in November, 1899, and caused the taro to dry up and rot. But it was not until March, 1900, that plaintiffs found fault with defendants for tightening the Paaluhi dam, and about a week after that, Mr. Peterson went to Manoa and caused the dam to be opened, and thereafter it remained so without interference on the part of the defendants. (Testimony, Ah Soong, pp. 31, 32.) It appears then that the real damage was done before the dam was tightened;" and also, "the testimony of Lum Ah Lee, the principal witness for plaintiffs, as to the area, age and value of the taro said to have been destroyed is in hopeless confusion. He admitted that he did not know the cost of planting, cultivating, and reaping his

taro, (p. 74,) yet, without this information, it is impossible to arrive at plaintiffs' loss. The testimony of W. L. Wilcox on the subject has no application whatever to the particular taro in question, and is not material in this case. * * * The court below in arriving at a decision applied the theoretical figures given by Mr. Wilcox to the admittedly inaccurate and conflicting statements of the Chinese witnesses, making no allowance for rent charges, taking no notice of the fact that the plaintiffs as well as third parties contributed to the injury, approximated the loss caused by nature and finally arrived at an estimated assessment against the defendants that is without foundation in fact and without evidence on which to rest."

We are unable to sustain the foregoing contention. The fact was immaterial that no fault was found by the plaintiffs with the defendants until March, 1900. The evidence of Mr. Wilcox was that of an expert who knew the market value and cost of producing taro in that vicinity. It was not requisite that he should know the actual cost of the taro in question. As to omitting a charge for rental in computing the plaintiffs' damages, we do not think that the loss from failure of the crop was required to be lessened by adding the rental of the land to the cost of production. If the plaintiffs had owned the land, interest on its value would not have been an item to add to the cost of the crop; but failure to make a charge for rental in computing the plaintiffs' damages, if such charge were proper, might reasonably be said to have been offset by the deduction for wages of laborers when, in fact, plaintiffs performed the work themselves, and did not make any outlay for labor.

"In actions for damages the requirement that the damages must not be uncertain is satisfied by a reasonable certainty in this respect. It is sufficient if there be such certainty as satisfies the mind of a prudent and impartial person. The law, it has been said, never insists upon a higher degree of certainty than the nature of a case admits." 8 A. & E. Ency. of Law, 610.

The damages awarded do not appear to be excessive, and are

based upon competent evidence. The decree appealed from is affirmed.

C. F. Peterson and Smith & Lewis for plaintiffs.

Robertson & Wilder for defendants.

THOMAS M. HARRISON *v.* J. A. MAGOON, F. B.
McSTOCKER, L. C. ABLES and DOROTHEA
EMERSON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED OCTOBER 3, 1904.

DECIDED OCTOBER 31, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

BILL OF EXCEPTIONS—*extension of time for.*

Under C. L. Sec. 1438, as amended by Laws of 1903, Act 32, Sec. 18, an extension of time in which to file a bill of exceptions must be allowed before the expiration of the twenty days allowed by statute or the extended time previously allowed by the judge under the statute.

ID.—*time for, in case of motion for new trial.*

The date when such twenty days begins in the case of an exception to a ruling on a motion for a new trial is the date of such ruling and not the date of the judgment entered in the case before the motion was made.

EXCEPTION—*to dismissal of motion for new trial.*

An exception lies to a dismissal, as distinguished from a denial or overruling, of a motion for a new trial. The remedy, if any, by mandamus, is not exclusive.

MOTION—*for new trial proper in case of involuntary nonsuit.*

A motion for a new trial lies for errors committed during the trial, including an error in ordering a nonsuit, although the exceptions to the rulings alleged to be erroneous may be brought directly

to this court by bill of exceptions, without first being made the basis of a motion for a new trial.

MOTION FOR NEW TRIAL—notice of.

C. L. Secs. 1462, 1463, do not make the right to move for a new trial on grounds other than that the verdict is contrary to the law and the evidence, conditional upon giving notice of the motion at the time of rendering the verdict or judgment.

OPINION OF THE COURT BY FREAR, C.J.

The only question presented in this case is whether the defendants' motion to strike the cause from the calendar and dismiss the plaintiff's bill of exceptions should be granted. The circumstances are these: On November 9, 1903, at the close of the trial in the circuit court, a nonsuit was ordered on defendants' motion. On November 12, 1903, judgment was entered. On November 14, 1903, a motion for a new trial was filed based on four grounds, namely, errors in admitting testimony, errors in excluding testimony, error in granting defendants' motion for a nonsuit, and error in discharging the jury. On December 31, 1903, time for filing a bill of exceptions was extended until ten days after the disposition of the motion for a new trial. On January 15, 1904, the motion for a new trial was dismissed, and the time for filing a bill of exceptions was further extended until twenty days after completion of the transcript. The bill of exceptions was filed August 6, 1904, within the time allowed.

The grounds of the motion to dismiss the bill of exceptions will be considered in their order.

1. That the bill of exceptions was not filed within the time allowed by law. The statute (C. L., Sec. 1438, as amended by Laws of 1903, Act 32, Sec. 18,) requires the exceptions to be incorporated in a bill of exceptions and presented to the judge "within twenty days after final judgment or such further time as may be allowed by the judge." It is obvious that this provision was not complied with, if the date of the final judgment must be considered as November 12, 1903, the day on which judgment was entered; for an allowance of further time, when

made after the expiration of the twenty days after judgment or the extended time, if any, properly allowed previously, is ineffectual. *Kapiolani Est., Ltd., v. Peck*, 14 Haw. 580.

It will be unnecessary to decide at present whether the filing of the motion for a new trial suspended the judgment until the disposition of the motion, so as to allow the fifty-five exceptions, including the exception to the order of nonsuit, which were taken during the trial and before the entry of judgment, to be incorporated in a bill of exceptions and presented to the judge within twenty days or further granted time thereafter; for, if the remaining exception, namely, that to the dismissal of the motion for a new trial, was properly incorporated in the bill and presented to the judge within the time allowed by law, the bill of exceptions can not be dismissed. In our opinion, that exception was incorporated in the bill and presented within the time allowed by law.

The section of the statute above cited, construed in connection with Sec. 1436 of the Civil Laws, permits exceptions taken in any "proceeding," as well as in any "trial" before a circuit court, to be incorporated in a bill of exceptions within the time limited. In the nature of things an exception could not be taken to the dismissal of a motion for a new trial within twenty days after judgment, when such dismissal was not made until after that time, and it would hardly be expected that a party should be obliged to obtain an extension of time before the ruling excepted to is made. If the motion for a new trial was properly made and ruled upon, an exception would, by the terms of the statute, lie to the ruling whenever it was made. Under the circumstances the reasonable view would seem to be to consider the motion for a new trial as a "proceeding," and not as a part of the "trial," and the judgment in that proceeding as the decision therein, rather than the judgment entered previously after the trial and before the motion for a new trial was filed. In that view the bill of exceptions, in so far as the exception to the dismissal of the motion for a new trial is concerned, was made up and presented to the judge within the time limited, for the exten-

sion of time was obtained within twenty days after the decision upon that motion.

2. That no exception lies to an order dismissing a motion for a new trial,—the contention being that mandamus to compel the judge to rule upon the motion, and not an exception to a dismissal of the motion, is the proper remedy where, as in this instance, the motion was dismissed and not overruled. It seems to us that whether mandamus would lie or not, an exception does lie; for the dismissal of the motion was an opinion, ruling or order within the meaning of the first portion of the section of the statute first above referred to, which provides that “a party may allege exceptions to any such opinion, direction, instruction, ruling or order,” that is, “in any trial or other proceeding before a circuit court * * * in any matter of law,” as shown by the preceding two sections in the Civil Laws.

3. That no motion for a new trial lies after an order or judgment of nonsuit. This ground also can not be sustained. In the absence of statute a motion for a new trial would lie in such a case, and generally elsewhere as well as here motions for new trials have been based upon rulings made and excepted to during the trial, as well as upon the ground that the verdict was contrary to the law and the evidence or upon the grounds of newly discovered evidence, misconduct of the jury, and the like. The ruling upon the motion for a nonsuit was such a ruling made during the trial. The mere fact that an exception to an order of nonsuit may be incorporated in a bill of exceptions and brought directly to this court, without first being made the basis of a motion for a new trial, does not prevent its being made the basis of a motion for a new trial. That is true also of other exceptions taken during the trial. It may usually be preferable to bring such exceptions directly to this court, but that method is not exclusive.

4. That no notice of a motion for a new trial was given at the time that the order of nonsuit was made. If such notice was necessary, it must have been by reason of some statutory

provision. The rule of the circuit courts, adopted in 1893, if it is still in force, required merely that notice of a motion for a new trial based on the ground that the verdict was contrary to the law and the evidence should be made at the time of the rendition of the verdict and before the jury was discharged. That has no application to a motion for a new trial based on errors of law committed by the trial judge during the course of a trial.

The statutory provisions that bear upon this question are those set forth in Secs. 1462 and 1463 of the Civil Laws, which read as follows:

"Sec. 1462. Judgment shall be entered by the clerk, without motion, immediately upon the rendition of a verdict, or of a judgment of the court in banco, or of a judge at chambers, and execution may issue thereon at any time thereafter, when called for, unless notice is given at the time of rendering the verdict or judgment, of a motion for a new trial and the filing of a bill of exceptions and bond, as provided by statute, within ten days after the rendition of such verdict or judgment: provided, that execution may issue within ten days, even though such notice be given, when good and sufficient cause can be shown therefor. The provisions of this section shall not affect the right of appeal."

"Sec. 1463. Any party against whom a verdict or judgment is rendered, as set forth in the last preceding section, may, upon filing a sufficient bond of security, conditioned for the payment of all costs of motion in case he fail to sustain the same, and that he will not to the detriment of the plaintiff in the action, remove or otherwise dispose of any property he may have liable to execution on such judgment, and upon giving notice of said motion and the grounds thereof to the opposite party, move the court at any time within ten days after rendition of verdict or judgment, for a new trial, for any cause for which by law a new trial may and ought to be granted. The filing of the bill of exceptions and bond shall operate as a stay of execution, until the motion is determined."

If these sections are taken just as they stand, they have no application to the present case, for a judgment of nonsuit by a circuit court presided over by one judge is not "a verdict, or a judgment of the court in banco, or of a judge at chambers." In

such case there would be no statutory limitation of time within which to give notice of a motion for a new trial, or even within which to make the motion; but in our opinion the words "in banco" have been repealed by implication by acts which have wrought sweeping changes in the Hawaiian judiciary since the enactment of these sections as Secs. 1155 and 1156 of the Civil Code of 1859, which were taken with extensive modifications from the Act of 1847, organizing the judiciary department. There is no longer a circuit court in banco or a Supreme Court sitting in banco for the trial of cases at *nisi prius*. The circuit courts take the place in general of the former supreme court at *nisi prius*. See *Republic v. Tokuji*, 9 Haw. 548, 550.

With the words "in banco" omitted, these sections apply to the present case, unless, indeed, they are confined in their operation to motions for new trials when made by defendants, in which case also there would be no statutory limitation of the time within which notice of a motion for a new trial would have to be given or within which the motion would have to be made by the plaintiff in this case. But there does not seem to be adequate reason for holding that these sections apply to defendants alone. There is no reason why they should be so limited and we believe it has not generally been supposed that they were. Their language, it is true, is framed to some extent as if motions by defendants were particularly in mind, but that was not unnatural, considering that defendants are usually the ones who make such motions. The fact that one of the conditions required in the bond by the second of these sections is that the moving party will not to the "detriment of the plaintiff" remove or dispose of his property does not by necessary implication limit the operation of the section to motions by defendants. That condition is required only when it is applicable. Not being applicable to a plaintiff, it is not required of him. It, indeed, does not apply even to defendants when it is not applicable to them, as in the case of a judgment against a defendant in ejectment for possession without damages. This has already been held. *Kaheana v. Nalimu*, 8 Haw. 227; *Kaniku v. Monsarrat*, *Id.* 229. See also

The Queen v. Gay, Id. 468, for somewhat similar reasoning under a different statute.

But do these sections, if applicable, require notice of a motion for a new trial to be given at the time of rendering a judgment of nonsuit? It must be confessed that they present several questions of difficulty, and they seem to be much in need of amendment, but taken together they do not, in our opinion, require notice of a motion for a new trial to be given at the time of rendering a judgment of nonsuit. The second of these sections relates primarily to motions for a new trial. It seems to be complete in itself. It affirmatively states that a motion for a new trial may be made upon certain conditions for any cause for which by law a new trial may and ought to be granted, and among those conditions there is no requirement that notice of the motion should be given at the time of rendering the judgment. The words "as set forth in the last preceding section" refer to the classes of judgments enumerated in the preceding section, and not to the other provisions of that section. That (the preceding) section relates primarily to the entry of judgment and the issue and stay of execution. The requirement that notice of a motion for a new trial should be given at the time of rendering the verdict or judgment is set forth merely as a condition of staying execution, and not as a condition of making a motion for a new trial. Whether such notice is necessary for the purpose of staying execution, in view of the last sentence of the second of these sections, need not be determined. The reason, if any, for holding that these sections are inseparable in this respect, is that unless a motion for a new trial would suspend the judgment it would be useless to make it, or, to put it another way, that, if execution may issue under the first of these sections unless notice of the motion is given at the time of the judgment, it would be futile to make the motion unless such notice were given. But this reason would apply with equal force to prevent the case from being taken to the Supreme Court on exceptions or writ of error for errors made during the trial, because, if execution may issue at once unless notice of a motion for a new trial

is given, it may issue notwithstanding the allowance of a bill of exceptions or the issuance of a writ of error when no motion for a new trial is made or notice thereof given. If it is replied that the statutes on writs of error and bills of exceptions contain provisions for a stay of execution, it may be rejoined that the second of the sections now in question likewise contains such a provision—not to mention the provisions of Section 1481 in the same chapter. As already intimated, the construction of these sections is not free from difficulty, and the fact that they were not drawn, as is evident, with due regard for harmony between them or for all the circumstances that might arise calling for their application, justifies a more liberal construction with a view to carrying out the general intent.

The chief difficulty in the way of this construction is that the court, only two of its members sitting, in *Kekaua v. Kalei*, 3 Haw. 683, held that notice of a motion for a new trial, based on the ground that the verdict was contrary to the law and the evidence, should have been given reasonably soon after the verdict, and was too late when made on the following day. That decision was undoubtedly correct under the rule of court then in force and referred to by the court, that an exception to a verdict must be taken at the time the verdict is rendered, for the exception was not taken, as well as the notice not given, until the next day, but the court based its opinion chiefly upon the ground that the notice was not given and that it was required by the first of the two sections of the statute above quoted. The decision is brief, and does not refer to the second of the sections above quoted, and it does not appear with what degree of care the question was considered. In so far as it was based on the statute, it does not commend itself to us, but it will be sufficient without reversing it to decline to extend it beyond the facts of that case. In the present case there is no rule of court in force similar to that then in force, and in this case the motion for a new trial is not, as it was in that case, based on the ground that the verdict was contrary to the law and the evidence. We believe that it has been the common practice here to include among the grounds of

a motion for a new trial errors of law committed during the trial, as well as the inconsistency between the verdict and the law and the evidence, and without giving notice at the time of rendering the verdict that the motion would be based upon those grounds. Moreover, the statutory provisions in question can not be held to apply in all cases of motions for a new trial, in so far as giving notice of the motion at the time of rendering the verdict is concerned; as, for example, when the motion is based upon matters arising subsequently to the verdict or judgment, such as newly discovered evidence, misconduct of the jury, etc. Rules of court also have required notice to be given only when the motion was based on the ground that the verdict was contrary to the law and the evidence.

Whether the fifty-five exceptions, or any of them, taken to the order of nonsuit and to the discharge of the jury, which were specifically made grounds of the motion for a new trial, may be considered ultimately, not as independent exceptions set forth in the bill, but incidentally in considering the exception to the dismissal of the motion for a new trial, or an exception to the denial of that motion in the event that the case should be remanded to the circuit judge for a ruling upon the motion, inasmuch as that motion was based in part upon errors not specifically enumerated therein occurring during the trial, we need not say at the present time; nor need we say now whether we can consider the question whether the motion for a new trial should have been overruled. In our opinion, the plaintiff was in order in making the motion for a new trial, in excepting to the dismissal of that motion, and in bringing that exception here in a bill of exceptions.

The motion to strike from the calendar and dismiss the bill of exceptions is denied.

Plaintiff in person; *Robertson & Wilder* with him.

Defendant Magoon in person; *Kinney, McClanahan & Cooper* and *S. H. Derby* with him.

HARTWELL, J.

I agree that the bill of exceptions can not be dismissed, and that we must consider the exception to the dismissal of the plaintiff's motion for a new trial, which in effect was a denial of the motion. I also concur in the opinion that no notice of the motion was required to be given at the time of the nonsuit; that it remains to be considered whether this court, in deciding upon the legality of refusing the motion for a new trial, can consider all the rulings during the trial to which exceptions were taken. My impression is that the general reference in the motion to errors during the trial is insufficient to bring them before the court as questions of law; but that is for future consideration after hearing argument.

But I think that the power of the circuit courts to grant new trials in cases of nonsuit is found in the common law of Hawaii, and not in its statute, Sec. 1463 C. L., which appears to me to provide for a new trial on the motion of a defendant only. The prerequisite of the motion there authorized is "upon filing a sufficient bond of security, conditioned for the payment of all costs of motion in case he fail to sustain the same, and that he will not to the detriment of the plaintiff in the action, remove or otherwise dispose of any property he may have liable to execution on such judgment, and upon giving notice of said motion and the grounds thereof to the opposite party." *Ib.*

It is also difficult, I find, to regard the new trials named in that section as distinct from the new trials in the cases contemplated by the previous section, namely, "immediately upon the rendition of a verdict or of a judgment of the court in banco, or of a judge at chambers," which requires immediate entry of judgment, and also that execution issue thereon, "unless notice is given at the time of rendering the verdict or judgment of a motion for a new trial, and the filing of a bill of exceptions and bond as provided by statute within ten days after rendition of such verdict or judgment."

The power of the circuit courts at *nisi prius* to grant new

trials of civil causes in certain cases not provided for by statute has been so long recognized by this court as to become common law of Hawaii. The practice has long been well settled that not only a defendant but a plaintiff may obtain a new trial, and that either party may do so upon the discovery of new evidence, or of misconduct of the jury too late to give notice of such motion at the time of the rendition of the verdict or judgment. Perhaps the limit of time for such motions, when not otherwise provided by rules, would be the term within which a court has inherent power to vacate its own judgments.

By English common law as regulated, if not declared by early statute of William IV. and George IV., a practice was established of taking out a rule during the term or four days thereafter to show cause why a new trial should not be granted, and this practice included cases of nonsuit. *Whitley v. Roberts*, 1 Exchequer (McC. & Y.) 109, Note A; *Great Northern Ry. v. Mossop*, 17 Com. Bench 134; *Lloyd v. Berkovitz*, 16 M. & W. 30; *Plumley v. Isherwood*, 12 M. & W. 189.

Except as herein modified, I concur in the opinion of the court.

TAKICHI SAKATA, KENKICHI TOCHIMURA, HEI-
HACHI AKABOSHI and CHOOJIRO YANAGI v.
ARTHUR M. BROWN, HIGH SHERIFF OF THE
TERRITORY OF HAWAII.

ORIGINAL.

SUBMITTED OCTOBER 17, 1904. DECIDED OCTOBER 31, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

LICENSES—*hack-drivers, knowledge of English language.*

Under a statute requiring an officer to give to an applicant a certificate that he is a "competent driver," if he, the officer, so finds upon examination, he can not refuse such certificate on the ground of the applicant's imperfect knowledge and understanding of the English language.

ID.

Under a statute authorizing an officer to make "rules regulating licensed drivers and licensed vehicles, and the fares to be charged by them," the officer can not make a rule requiring the applicant for a license as a driver to "prove to the satisfaction of the competent authorities that he is sufficiently conversant with the English language for the conduct of his business."

OPINION OF THE COURT BY FREAR, C.J.

This is a submission upon agreed facts as a substitute for an application for a writ of mandamus to compel the high sheriff to give the plaintiffs certificates that they are competent drivers, they being applicants for licenses to carry passengers for hire, and such certificates being required by the statute as a prerequisite to obtaining such licenses. The plaintiffs had applied to

the high sheriff for examination and the issuance of such certificates, but the latter, after examining them, refused to grant them such certificates solely "because of their imperfect understanding and rendering of the English language." It is admitted that the plaintiffs are otherwise qualified, and more particularly that they "understand the management of their horses and vehicles, understand the names of streets and prominent localities within the said district of Honolulu, and, in the Japanese translation, understand the 'regulations for carriages and rates of fare' now in force." The high sheriff relies upon Secs. 99 and 102 of Act 64 of the Laws of 1896, (P. L., Secs. 791, 794,) which is the general license act, and the 26th rule made under the authority conferred by said Sec. 102. These, as modified by the Organic Act, read as follows:

"Sec. 791. The high sheriff, or a sheriff, or deputy high sheriff, or an inspector appointed by the high sheriff for such purpose, shall, before any license is issued for any passenger vehicle, inspect the vehicle for which a license is requested, and the harness and the animals to be used therewith, and if he find the same to be in good serviceable condition he shall deliver to the applicant therefor, a certificate setting forth such fact, and the capacity of the vehicle. Such officer shall also examine any applicant for a driver's license, and if he find such applicant to be a competent driver he shall give him a certificate to that effect. No license shall be issued to any driver or for any passenger vehicle until the receipt by the treasurer of such certificate."

"Sec. 794. The treasurer may, from time to time, make rules regulating licensed drivers and licensed vehicles, and the fares to be charged by them, which rules shall be published in some newspaper or newspapers, and shall then have the force and effect of law."

"26th. Every hack-driver, before being licensed as such, must prove to the satisfaction of the competent authorities that he is sufficiently conversant with the English language for the conduct of his business, and well acquainted with streets and localities in and around Honolulu."

Doubtless the business of carrying passengers for hire is one for the exercise of which a license may be required, and one

which may properly be subjected to reasonable regulations under the police power. The extent to which such regulations may lawfully go has often been the subject of discussion in this jurisdiction, and it is unnecessary to go over the ground again in the present case. See particularly *Tai Kee v. Minister*, 11 Haw 57, and 12 Haw. 164, (lodging houses), and *Re Licenses*, 7 Haw. 771, (licenses in general); also *The King v. Tong Lee*, 4 Haw. 335; *Rep. v. Kum Lee*, 10 Haw. 491, and *Rep. v. Ching Geung*, 11 Haw. 667, (laundries); and *Bradley v. Thurston*, 7 Haw. 523, (intoxicating liquors). The only instance, so far as we know, in which a language test has been attempted was in the case of *The King v. Lau Kiu*, 7 Haw. 489. In that case the court held void an act of the legislature which prescribed that no wholesale or retail license should be granted to any person except upon the express condition that he should at all times keep full, true and correct books of account of all business transacted by him in connection with the licensed business, in the English, Hawaiian, or some European language. We refer to these cases partly for the purpose of showing that even if a statute or regulation imposing a language test in cases of this kind would be constitutional, still it would be of such an extreme nature, or so close to the line of unconstitutionality that a statute claimed to go to that extent should not be so construed except in a clear case, or should not be extended by construction beyond its plain terms. See especially *Tai Kee v. Minister*, 11 Haw., at page 66. The propriety of this view is particularly obvious when, as in this case, an attempt is made to impose the test of a single language, even though that is the English language, in a city in which by far the larger portion of the population consists of those, namely, Hawaiians, Portuguese, Japanese and Chinese, who naturally speak other languages, many of whom can not speak the English language to any great extent, and most of whom might naturally desire to engage carriages having drivers of their own respective nationalities.

Turning now to the statutory provisions and the regulation

relied upon, and assuming that the finding by the high sheriff that the applicants had an "imperfect understanding and rendering of the English language," was a finding that (in the words of the regulation) they were not "sufficiently conversant with the English language for the conduct of their business," was he justified in refusing the certificates on that ground? The statute (Sec. 791, *supra*,) requires him to issue a certificate if he finds the applicant to be a "competent driver." It needs no argument to show that one may be a competent driver without having any knowledge whatever of the English language. In order to be a competent driver one need not be conversant with the language of a particular portion of the community in which he proposes to conduct his business. This being so, the high sheriff must be held, upon the facts set forth in the agreed case and in the absence of any showing to the contrary, that the plaintiffs were competent drivers. This provision of the statute does not itself impose a language test, nor does it authorize the high sheriff to impose one.

The other section of the statute (Sec. 794, *supra*), it is true, authorizes the treasurer to make rules, and provides that such rules, when published in the manner prescribed, shall have the force and effect of law, but the scope of such rules is confined to the regulation of "licensed drivers and licensed vehicles, and the fares to be charged by them." Taken literally, the statute, in so far as it authorizes rules in regard to drivers, confines them to drivers who are already licensed, and even if this provision should be more liberally construed so as to authorize rules in regard to preliminary examinations of applicants, such matters covered by such rules would have to be incidental to matters relating to drivers after they were licensed. This provision contemplates rules regulating the conduct of the business, and does not contemplate a rule of such an unusual or drastic character as that now in question, discriminating by a preliminary language test as to who might be drivers. The statute itself contemplates that those may be drivers who are competent to drive. See *St. Charles v. Nolle*, 51 Mo. 122; *St. Louis v. Grone*, 46 Mo. 574,

and *Collinsville v. Cole*, 78 Ill. 114, for instances in which ordinances or regulations in regard to vehicle licenses have been strictly construed.

The conclusion is that the high sheriff should issue the certificates in question. Judgment accordingly.

Atkinson, Judd and Mott-Smith for plaintiffs.

Lorrin Andrews, Attorney General, for defendant.

IN THE MATTER OF THE ESTATE OF THOMAS
CUMMINS, DECEASED.

APPEAL FROM DE BOLT, CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED OCTOBER 7, 1904. DECIDED NOVEMBER 7, 1904.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE GEAR IN
PLACE OF HATCH, J.

LIFE TENANT—*remainderman, stockholder's right to purchase new shares at par.*

A stockholder's right to purchase at par new shares issued by a corporation is not "income, profits or gain" of the shares held by him, but belongs to the principal as an incident of its ownership accruing to the remainderman and not to the life tenant or beneficiary, the new shares being issued for payment of corporation debts, following *Carter v. Crehore*, 12 Haw. 309.

TRUSTEE—*liability of, for failure to exercise right of stockholder to buy new shares at par, or to sell such purchase right.*

A trustee holding shares of the corporate stock of a corporation which has voted to issue new shares in payment of the corporate indebtedness, and to allow shareholders to take a pro rata number of new shares at par, is not required to borrow money on trust securities or use uninvested funds for purchase of the new shares; but is liable for the value of the rights to purchase them, which

rights he released without pecuniary consideration to the life beneficiary, although he acted on legal advice and believing that the life beneficiary was entitled to the rights. Decision in *Banning Estate*, 9 Haw. 453, followed.

MASTER'S REPORT—failure to except.

Rule discussed that master's report presumed correct unless obvious error in applying the law or serious mistake in considering the evidence. No occasion to apply the rule in this case.

OPINION OF THE COURT BY HARTWELL, J.

The question presented by the appellants is concerning the liability of the trustee for failing to buy for the estate forty shares of stock of the Wailuku Sugar Company, or to sell for the benefit of the trust estate the right to purchase those shares at par, the facts being as follows:

August 10, 1903, the administrator and trustee with the will annexed of Thomas Cummins, deceased, filed his accounts to June 30, 1903, before De Bolt, J., of the First Circuit, at chambers. Thomas Cummins at his death left a will which was admitted to probate, of which will, omitting the formal parts, the following is a copy:

"I give, bequeath and devise to the said Alexander J. Cartwright Senior, my said executor and trustee, the following real and personal property, that is to say all my lands and premises on Kaahumanu street, and King street and twenty (20) shares in the capital stock of the Wailuku Sugar Company, and also all the rest, remainder and residue of my real and personal property or estate of which I shall die seized or possessed or the owner.

"Subject however to the execution of the following trust, that is to say

"My said trustee shall control and manage all of the said trust property, according to his best judgment, for the interest and advantage of the *cestuis que trust*, hereinafter named

"And shall invest and keep invested all money and stock and use or dispose of the same and all other personal property and invest the proceeds as he shall deem best to carry out the trust herein declared; and keep in good order and repair the buildings on said real estate, as he may deem best and rent or use

the same as he may deem best for the purpose of properly performing said trust, and

"First; shall deliver over to my son Thomas Jefferson Cummins, for his sole use and benefit during the term of his natural life, the net income, rents and profits of all my said real estate on Kaahumanu and King streets and of the twenty shares of Wailuku stock aforesaid, as well as the net income of all other property real or personal of which I may die possessed, and

"Second; after the death of my said son, the said Thomas Jefferson Cummins, shall pay and deliver over the said net income, rents and profits to his daughters Lydia, Beatrice and Elizabeth, in equal parts if living, and if either of said daughters shall then be dead, the principal and property, the interest and income of which would otherwise be going to her, shall be paid directly to her lineal heirs, if any, and if none, the said interest and income shall be paid to the survivors equally, and upon the death thereafter of either of the survivors, my said trustee shall pay and deliver over the principal and property, the interest and income of which has theretofore been paid to her, to her lineal heirs, if any and if none such then exist, shall then pay and deliver the same to the collateral heirs of such one dead."

The par value of the shares having been changed after the death of the testator from \$500 to \$100, the trustee received instead of the 20 shares of the par value of \$500 left by the testator, 100 shares of the par value of \$100. In 1897 the Wailuku Sugar Company issued 2,000 shares of new stock for payment of its bonded indebtedness to that extent, giving to stockholders the right to buy at par their pro rata number of the new shares. The trustee thereby became entitled to purchase at par forty new shares, and in fact a certificate in his name for those shares was made out on the books of the corporation, but was not delivered to him. The trustee being absent from the Territory at that time, his agent, acting under a general power of attorney not specifically authorizing transaction of trust business, being led to believe that the life beneficiary, the son, was entitled to the benefit of buying the new shares at par, assigned them to the son, who paid \$4,000 for them and soon after sold them for \$6,000. At the time of the issue of

these new shares the stock was selling at \$150 a share; consequently the rights to purchase the 40 shares were worth \$2,000.

The trustee's accounts were referred to a master. At some time which does not appear in the papers before us, between the purchase and sale by the son, Thomas, of the 40 new shares and the filing of the trustee's accounts, the son died, leaving J. O. Carter, formerly his agent, as executor under his will. At the hearing before the master Cecil Brown appeared for the petitioner, the trustee, Holmes & Stanley for J. O. Carter, the executor, and M. F. Prosser for Maria (Beatrice) King and Elizabeth Fairchild, two of the daughters of the son Thomas named in the will of the first testator. At a later time Mr. Breckons also appeared for the daughters above mentioned, and Mr. Ballou appeared with Mr. Brown for the trustee.

In the master's first report, after mentioning that "on December 1, 1897, the petitioner appears to have purchased 40 shares in this company at par, being \$4,000," and that "on December 28, 1897, within one month from the time of their purchase these identical shares were sold by the beneficiary at an advance of \$50 a share, showing a clear gain of \$2,000," adds "although the money in this transaction was not the estate's principal, I merely refer to it to see if there is anything in it to mitigate to any extent the surcharges herein made." To this report the Maria King and Elizabeth Fairchild, beneficiaries under the will of the elder Cummins, by their attorney, filed their "objections" for the following reasons:

"That the said trustee has not fully accounted for property of the estate of decedent in that he should now have in his possession as part of said estate, the 40 shares of stock in the Wailuku Sugar Company, referred to on the sixth page of said report. That said 40 shares of stock in said Wailuku Sugar Company were issued to the estate of decedent and were awarded to said Cartwright as trustee of said estate."

At the hearing on this report "the matter of the 40 shares of the stock of the Wailuku Sugar Company" was at Mr. Brown's request referred back to the master, who thereafter reported as follows:

"That on December 1, 1897, a certificate of stock No. 283 for said forty (40) shares, par value of each \$100, in the stock of said company, was issued to 'Bruce Cartwright, trustee for T. Cummins.' That immediately thereafter Thomas J. Cummins, *cestui que trust* in this estate, claimed the right to take up those shares as his own property as he had the money and the estate was without funds. That the petitioner, Bruce Cartwright, by W. M. Graham, took legal advice on the point and he was advised that the claim of the *cestui que trust* was good. Thereupon said 40 shares were delivered not by Bruce Cartwright but by the agents C. Brewer & Company, to the said Thomas J. Cummins, through his agent, J. O. Carter who, on December 28, 1897, or within a month from the time said shares were issued, sold them at an advance of \$50 a share, thus realizing a clear gain of \$2,000. That the amount paid for said 40 shares was \$4,000 whereas at this time the principal of this estate was only \$3,000 and that amount is now the only principal and no more as reported in the master's main report. That \$600 of said principal was previously to December 6, 1897, invested in bonds of the Oahu Railway & Land Company, and they are still at this present time, in the same form. That previous to December 6, 1897, the sum of \$2,400 out of said principal was invested in Hawaiian Government bonds, and that the redemption of said bonds did not take place until December 1, 1901. That the principal of this estate, to wit, \$3,000, was not available at the time said 40 shares were purchased, to wit, December 6, 1897."

Before any hearing upon the second report, the master filed two more reports containing additional findings of fact which are immaterial to the question presented in this case, except the finding that "there was no delivery other than the endorsement by his attorney in fact made upon the certificate for said shares." His fourth report, filed January 7, 1904, contains the following: "I find that the objections raised by the contestants as to the ownership or accounting for the 40 shares additional in the capital stock of the Wailuku Sugar Company are without merit and should be dismissed." The master in his report gives his views of the law on the subject of the right to purchase the new shares. To this last report of January 7, 1904, the same beneficiaries, Maria King and Elizabeth Fair-

child, filed their "objections and exceptions," stating as reasons therefor that the master's finding "as to the ownership or accounting for the 40 shares additional in the capital stock in the Wailuku Sugar Company, said finding being that the objections of Maria King and Elizabeth Fairchild are without merit and should be dismissed, is contrary to law." After the hearing on these reports the judge filed his decision, which, after passing upon other matters not now in controversy, contains the following: "I also find that the 40 shares of stock in the Wailuku Sugar Company was rightfully purchased by Thomas J. Cummins, the report of the master in that respect being also approved." The order, signed by the judge, in conformity with his decision, after providing for other matters, such as commissions and attorneys' fees, concerning which no question is now presented, contains the following: "The sale of the 40 shares of stock in the Wailuku Sugar Company to Thomas Jefferson Cummins is hereby approved;" and further decrees that the trustee, "upon paying into court the balance shown by his account plus the surcharges and with the allowance made in the order, is discharged and relieved from further liability."

From this order or decree Maria King and Elizabeth Fairchild appealed generally to this court.

The appellants claim that the trustee is chargeable with the 40 shares of new stock, on the ground that they were legally issued to him, or, at any rate, for \$2,000, the value of the rights to purchase the shares at par, basing this claim upon the authority of *Carter v. Crehore*, 12 Haw. 309, decided February 27, 1900.

They also claim that the trustee ought to be compelled to account for \$5,000, being the difference between the present value of the 40 shares and the \$4,000 paid for them.

The trustee claims that the new shares, or the right to purchase them, should be regarded as "income, rents and profits" of the original shares, and as profits belonging to the first life beneficiary, in support of this view citing *Wiltbank's Appeal*, 64 Pa. St. 258, in which the court held that a stockholder's

right to subscribe for stock "is a mere product, a right incidental to the stock and, therefore, income."

The trustee further claims that if he made a mistake in the law, acting as the master found that he did, on the advice of counsel, he is not liable for loss resulting to the estate, citing *During's Appeal*, 13 Pa. St. 224, in which the following language was used by the court: "It is a sound rule in Pennsylvania and perhaps in England, though the decisions are discrepant there, that a trustee who has acted faithfully and by advice of counsel is not responsible for mistakes; the most prudent could do no more. * * * It was well said by the master of the rolls in *Vez v. Emery*, 5 Ves. Jr. 144, that if the trustee in that case had paid by the advice of any counsel in England he would not have held him liable." The following cases are also cited: *Miller v. Proctor*, 20 Ohio St. 442; *Thompson v. Brown*, 4 John. Ch. (N. Y.) 619, 629.

The trustee submits that the equities of the case ought to be controlled by the fact that the owners of the interest in remainder are the three daughters of the life beneficiary, and that they inherited, according to the master's report, "the greater part of the property of the life beneficiary, and therefore presumably the greater part of the proceeds of the right in question, yet they are now seeking to compel the trustee who has received nothing to pay again to them the value of the said right." Other contentions of the trustee are noticed below.

If this court were at liberty to adopt the law upon the subject declared by the Supreme Court of Pennsylvania, apparently the Wiltbank appeal case cited by counsel for the trustee does not state the law as it is now held in that jurisdiction, *Biddle's Appeal*, 99 Pa. St. Rep. 278, holding that where a corporation increases its capital stock by offering to stockholders the option of subscribing at par for the stock in the proportion of one share for every two shares held, the proceeds of a sale of an option by one holding stock in trust to collect the income for the use of another for life are to be accounted capital and not income, in so far as they relate to the beneficiary.

But the decision in *Carter v. Crehore*, in reference to stock dividends, is conclusive in the present case: "The premium upon stock, which represents the increased value of the property or business of the company, is an incident of the corpus and not income from it. If new stock is issued at par, and not as a dividend, the right to take the stock at par represents the premium and is in no sense income or representative of income. It belongs to the holder of the stock, the trustee, for the benefit of all interested in the stock. He may sell the right to take the stock at par and the proceeds will be held for the remaindermen, the income thereof to go to the life tenant." 12 Haw. 326.

It does not follow from the fact that the trustee had the right to buy the new shares at par that it was his duty to do so, either by borrowing money on the trust securities, or by using uninvested trust money in his hands. The will permits him to invest "as he shall deem best," and he is not required by law to select any particular securities for investment; but while the trustee can not be charged with the consequences of failing to buy the new shares, he had no discretionary power or right to relinquish to any one the actual value of the rights or options except on receipt of their actual value, which in this case was \$2,000. The first life beneficiary, Thomas J. Cummins, was no more entitled to that benefit than if he had been a stranger to the trust. The trustee, by allowing him to receive that benefit, has allowed the principal of the trust fund to be precisely \$2,000 less than it would have been if he had sold those rights for their value, and his liability can not exceed that sum.

The claim of the trustee of the inequity of a decree which enables the appellants to obtain from the trustee the benefit of the profits which their father made on the shares, as well as to obtain to a large extent the same profits under their father's will, as a part of his estate, especially in view of the fact that the trustee did not receive the money, and acted in absolutely good faith in giving their father the chance to buy the shares, is a claim which would have great force if the appellants were the remaindermen, and had come into possession of the estate

upon the determination of the trust. But they are not so. They also are life beneficiaries of the income only. The body of the estate must remain intact for those who under the will shall become entitled to it after the decease of the daughters.

The action of the trustee in releasing these valuable rights, without receiving for the trust estate full pecuniary consideration, renders him liable for the values so relinquished, on precisely the same ground that a trustee would be liable for giving away any portion of a trust estate. Advice of counsel would be no protection in such case, even if it appeared, as it does not appear in this case, that competent and disinterested counsel gave the advice; or that it was given directly to the trustee or his agent, Mr. Graham, and not through J. O. Carter, who represented the interest of T. J. Cummins. It is not legal advice from any counsel, nor is it legal advice in any case which protects a trustee. The only proper advice to this trustee would have been to sell the rights for what they would bring, or to obtain the instructions of the court on the propriety of buying the shares. It appears from the Pennsylvania cases cited for the trustee on this matter of legal advice protecting a trustee, that the law does not enable a trustee to obtain, as it does here, the instructions of the court.

Referring to the cases cited by the trustee's attorney on this point, *Neff's Appeal*, 57 Pa. St. 95, was a case in which an executor had not brought suit on certain promissory notes left by the testator. The court held that the testator was not to be charged for the amount of those notes, since a suit upon them against the maker of the notes "would have broken up his business without producing any fruits." *Chambersburg Saving Fund Assn. Ap.*, 76 *Ib.* 203, was also a case in which the court held that a trustee should not be chargeable for a loss on securities which he had failed to sue upon "in case he has exercised common skill, common prudence and common caution." The court further said that the trustee ought to have communicated to the lawyer on whose advice he acted a certain fact, which he failed to communicate, and that the fact that he acted upon legal

advice without having informed his counsel did not protect him, saying, "his duty clearly required him to ascertain that fact and to communicate it to the lawyer whose opinion he asked. We can not see how any person in the exercise of common prudence and care would have done less." In *Bradley's Appeal*, 89 *Ib.* 514, the court declined to hold trustees liable in relinquishing a certain claim to the proceeds of an execution sale, under a compromise with another execution creditor, in regard to the effect of seizures under their respective writs, the trustees acting in the matter under advice of counsel. In *Miller v. Proctor*, 20 Ohio 442, executors were not held liable for a loss resulting from their taking a mortgage upon partnership property to secure an individual debt of one of the firm. The court held that they were excusable for their ignorance of the law, having "followed the advice of their counsel, a lawyer of large practice and long experience, and who stood high in his profession!"

The general rule prevails in England that advice of counsel will not protect a trustee in making a wrong payment of trust funds. 2 *Perry on Trusts*, Sec. 927. The rule is thus stated in *re Knight's Trusts*, 27 *Beav.* 49: "It is said that the trustee acted upon the advice of counsel. I regret it, but that does not make any difference. In *Doyle v. Blake* it was held that such advice could not exonerate them from the consequences of their acts."

Examination of the cases cited by the trustee's attorneys in their able brief fails to satisfy us that the trustee can be held irresponsible under the showing made in this case, for parting with the value of the rights to buy new shares merely on the ground that he acted on legal advice or in good faith.

The rule laid down in *Banning Estate*, 9 *Haw.* 453, requires us to hold that the trustee is not exempt from liability for loss merely because he acted in good faith and in the belief that his action was for the interest of the trust estate.

The absence of the trustee from the Territory, when his agent took the course complained of by the appellants, does not exon-

erate the trustee, but rather increases his responsibility. In the case last above cited two of the investments of the trustee "were not made by the administrator personally, but by a trusted agent. It is immaterial that the agent be possessed of the highest business capacity, tact and experience. A loss occasioned under such circumstances must be made good by the trustee." *Ib.* 463.

Our attention is called by the trustee's attorneys to the form of the objection to the master's report made by the appellants, and it is submitted that the only question which this court can consider is that which is presented by that objection; that the form of the objection leaves for this court nothing to pass upon but the question of the ownership of the shares. The point is interesting, for it appears that prior to its present equity rule 83, on the subject of a master's report being confirmed in all respects excepting when exceptions are taken to it, the U. S. Supreme Court held that it was proper practice in equity to require exceptions to a master's report pointing out specifically the errors upon which the party relies. *Story v. Livingston*, 13 Peters 365; *Medsker v. Bonebrake*, 108 U. S. 72; *Sheffield Ry. v. Gordon*, 151 *Ib.* 290.

The rule with its limitations is stated in *Tilghman v. Proctor*, 125 *Ib.* 136, in which the cause had been referred to a master to take testimony and report, which he did, "and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." *Crawford v. Neal*, 144 *Ib.* 596.

There is no occasion, however, to pass upon the question, since the appellants' exception to the master's finding evidently intends to object to the master's finding on the subject of the trustee's course in regard to the new shares.

The decree appealed from is set aside to the extent required

by this opinion, and the case is remanded to the first judge of the first circuit, with instructions to enter a decree conformably herewith.

M. F. Prosser, R. W. Breckons for the appellants.

Cecil Brown, Ballou & Marx for the appellee.

TERRITORY OF HAWAII *v.* WATANABE MASAGI and
FUNAKOSHI TATSUGORO.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

ARGUED OCTOBER 10, 1904.

DECIDED NOVEMBER 7, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

BILL OF EXCEPTIONS—*practice.*

The practice of referring to papers filed in a case as part of a bill of exceptions instead of incorporating in the bill copies of papers relied upon is objectionable.

ABSENCE OR DISAPPEARANCE—*of papers referred to in the bill of exceptions.*

The court can not pass upon exceptions not presented by the papers in the case. If papers relied upon which were on the files are not there, the defendants' attorneys, on discovering their absence, should apply to the trial court to replace them. A new trial is not granted on a bill of exceptions on the ground of absence of papers relied on in the bill.

TRANSCRIPT OF PROCEEDINGS—*discrepancies from same in bill of exceptions.*

The bill of exceptions making the transcript part of itself, a discrepancy between the two may properly be resolved in favor of the correctness of the transcript, which was made from stenographer's notes taken at the time.

SEPARATE TRIALS—for joint offense.

It was discretionary with the court whether to order a separate trial of the two defendants charged with the murder of one M. K. The evidence does not show that a joint trial was prejudicial to either defendant, following *The King v. Paakaula*, 3 Haw. 30; *Rez v. Tin Ah Chin*, *Ib.* 90.

EXHIBITS PRESENTED IN TRIAL COURT—not required with bill of exceptions.

It is neither requisite nor proper to present for the consideration of the exceptions in this case the exhibits, such as swords, kimonos, etc., which were filed in the trial court.

EVIDENCE—former offenses.

It is not error to admit evidence of facts showing motive, or which are part of the transaction, or exhibit a train of circumstantial evidence of guilt, although such facts showed former offenses of the defendants.

WITNESS—cross-examination for the purpose of impeaching—expert.

It is not error to disallow on cross-examination a question asked for the purpose of laying a basis to impeach the witness on an immaterial matter.

It was not an abuse of discretion by the court to allow a trained chemist to testify of his analysis of charred cloth, in which he found, as he said, that there had been blood, whether human or not, he could not say.

VIEW OF PREMISES—by jury.

The question of the legality of a view of premises by the jury and of statements there made by the sheriff and deputy sheriff to the jurors in answer to their questions concerning the condition of things as they first found them there is not presented by any of the exceptions in this case, a view in criminal cases said, however, to have been the practice in Hawaii as at common law.

EXPERT—hypothetical question.

It was proper for the court to ask a medical expert whether an ordinary man in inflicting upon himself a wound (described in the question as in the evidence) would be most likely to use his right hand or his left hand.

It is erroneous to allow hypothetical questions unwarranted by any testimony in the case. A question to a medical expert was properly ruled out which required him to say on the hypothesis named to him "whether or not that wound could have been inflicted by the man himself," the facts assumed being of a nature not calling for an expert opinion.

VERDICT—*sustained by evidence—the court does not pass upon the possibility of doubt.*

The evidence in this case fully sustains the verdict of manslaughter which was rendered.

Because of evidence on which doubt of guilt might be based, the court can not say that such doubt ought to have been produced in the minds of the jury.

SENTENCE—*general exception to, without stating ground for the exception.*

A general exception to a sentence, stating no grounds for the exception, does not present a question of law upon the legality of the court pronouncing sentence without first asking defendants if they had anything to say why sentence should not be pronounced.

OPINION OF THE COURT BY HARTWELL, J.

The defendants were tried at the January Term, 1903, of the Fourth Circuit Court held at Hilo, Island of Hawaii, Little J., presiding, upon an indictment charging them with the murder of one Motohiro Kitaro, January 25, 1902. The indictment charged murder in the first degree. The jury rendered a verdict finding the defendants guilty of murder in the second degree. The court sentenced the defendant Funakoshi Tatsutaro to imprisonment at hard labor for thirty years and the defendant Watanabe Masagi to imprisonment at hard labor for twenty-five years.

The bill of exceptions, following the practice which has long prevailed here, although unauthorized in many other jurisdictions, does not incorporate in itself copies of the pleadings, motions, instructions and exhibits filed in the trial court, and intended to be relied on, but refers to those papers and recites that "said defendants hereby refer to, incorporate herein and make a part of this bill of exceptions all records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcripts and other papers and documents in said cause the same as if they and each of them were actually set out herein in words and figures;" and prays that the bill of exceptions be allowed, and that the above mentioned records and other papers

"be expressly made a part of this bill of exceptions and incorporated herein as fully and completely as if they and each of them were actually set out herein in words and figures."

The trial judge allowed the bill of exceptions, ordering that the records and papers above mentioned, and specifically mentioned in the order, be "made a part of said bill of exceptions and incorporated therein as fully and completely as if they and each of them were actually set out therein in words and figures."

The practice is open to serious objections which are evident in this case, in which it appears that several of the papers above mentioned are not now before us. The plaintiff claims that the following papers are missing, namely: Two motions to quash the indictment, motion for separate trial of Watanabe, motion for continuance of trial, challenge to array of trial jury, instructions to the jury; Exhibit "A," being map or plan which was used in evidence, also the following additional exhibits, viz.: "B" and "C," swords; "D," "E," kimonos; "F," piece of cloth; "G," "K," pants; "I," shirt; "J," knife. Copies, however, are now filed of the motions for separate trial and continuance and their accompanying affidavits, sworn to by one of the attorneys of the defendants at the trial. The transcript of the evidence and proceedings states that the defendants were arraigned January 14, 1903; that the indictment was read and translated to them; that the case was set for trial on Monday, the 19th, at 10 o'clock, the plea to be heard at 9 o'clock; that on Thursday, January 15th, the time to plead was set for 1:30 p. m. of "Friday the 17th," (that day being the 16th). The transcript thereupon reads as follows:

"Friday P. M., January 16th, 1903.

MR. ROSS. In this case we have filed a motion to quash the indictment.

Both defendants present in court.

MR. ROSS reads the motion.

THE COURT. Motion overruled.

MR. ROSS. We note exception on this.

THE COURT. No.

MR. ROSS. Your honor certainly will allow us an exception.

THE COURT. Well, exception allowed.

THE COURT. Are you ready to plead?

MR. ROSS. Yes, sir."

The record of the clerk of the Fourth Circuit Court, a certified copy of which is before us, does not state that the motion was filed, but reads: "A motion by the attys. for the defense to quash was denied by the Court, and the defendants entered a plea, not guilty."

The transcript on the subject of the second motion to quash, and also on the motions for separate trials and continuance, reads as follows:

"Monday, A. M., January 19th, 1903.

MR. W. H. SMITH. We desire to withdraw the plea made the other day in order that we may make a motion.

D. ATTORNEY GENERAL. We will object. Not timely and that they had already entered a plea of not guilty thus putting themselves upon the country for trial.

THE COURT. Let me know what the motion is.

MR. W. H. SMITH. The motion we would desire to file subsequent to the withdrawing of the plea, if we be allowed to do so, would be a motion to quash on the three grounds presented the other day and another ground, that the grand jury which drew the indictment was not drawn in accordance with law and therefore the indictment is null and void.

THE COURT. Motion overruled.

MR. LE BLOND. We would like an exception to the overruling of the motion.

THE COURT. Exception allowed.

11:00 A. M., Monday, January 19th, 1903.

Mr. Le Blond presents motion for separate trial of Watanabe Masagi, together with affidavit of Watanabe Masagi.

Argument.

DEPUTY ATTORNEY GENERAL. No time to file counter affidavits; affidavits presented at 10 o'clock.

THE COURT. Be ready for trial at 1:30 without fail.

Argument by Deputy Attorney General.

Session suspended until 1:30 P. M.

Afternoon session opened at 1:30.

Argument by Deputy Attorney General continued.

Argument by Mr. Le Blond.

THE COURT. Overrule motion for severance. Proceed on the trial of both of them.

MR. LE BLOND. Will the court allow us an exception?

THE COURT. Allow the exception.

MR. ROSS. If the court please, in the case now on trial we have filed a challenge to the array of the jury; also have served copy on the prosecution.

MR. ROSS reads affidavit of C. M. Le Blond attached to challenge.

MR. ROSS. I would like to make the change from grand jury to trial with the consent of the affiant before the notary.

THE COURT. Make the change.

THE COURT. Challenge overruled on the ground the venires speak for themselves. I decline to hear any evidence in the matter whatever, for the same reason that the record speaks for itself.

MR. ROSS. Exception to the ruling of the Court in refusing to permit us to introduce evidence at this time and also to the ruling of the court on the challenge.

The defense moves for continuance of trial on account of absence of material witnesses, eighteen miles away, and the court overrules the motion, which is on file, on the ground of sufficient time allowed to get the witness here.

MR. LE BLOND. We note exception.

THE COURT. Exception allowed.

THE COURT. Call the jury to try the case.

Jury sworn to try the case."

The clerk's record fails to mention the filing of motions for separate trials, of challenge to the array, or continuance, reading as follows:

"Le Blond and Smith & Wise and Ross, Att'ys for defendants 11:30 A. M.

"A motion, that the defendants have a separate trial was argued. Suspended till 1:30 P. M. At 1:30 P. M. the court meets and counsel for the defense challenges the array of jurors. The court overrules the motion to challenge and to hear evidence, and a motion for continuance was denied, to which exceptions were noted."

Neither the transcript nor the clerk's record mentions the presentation or filing of any request for instructions on the part of the defendants, or prosecuting attorney, nor is any mention

made therein that the instructions to the jury given by the court were reduced to writing. The transcript shows that upon the rendition of the verdict of murder in the second degree, Thursday evening, January 22, the following occurred:

"MR. ROSS. (Atty. for defendants.) I object to the verdict as being contrary to the law and the evidence and the weight of the evidence, and give notice of motion for a new trial." (P. 271.)

And further, that on January 28, 1903, leave was granted to amend by interlineation the defendants' motion for new trial, which, as amended, was "presented by the defendants." (P. 272.) The clerk's record, on the subject of motion for new trial, states that it was argued, but neither the record nor transcript mentions that the motion was filed.

It is apparent from the transcript that the second motion to quash the indictment on the three grounds presented in the first motion, and also on the further ground that the jury was not drawn in accordance with law, was not filed, the defendants having pleaded and the court declining to allow their pleas to be withdrawn; nor does it appear from the record that either the motion for separate trial of Watanabe, together with his affidavit, or a motion for a new trial, was filed, although a sworn copy of the former motion with affidavit is filed herein. On the subject of instructions and motions for a new trial the bill of exceptions reads as follows:

"FIFTY-FOURTH EXCEPTION.

"Whereafter both the Territory and the defendants having rested and argument having been made to the jury by the respective counsel, the court proceeded to charge the jury, and the said instructions of the court so given to the jury are hereby made a part of this exception as though the same had been fully set out herein, and the exceptions taken to the said instructions and the refusal of the court to give the instructions asked by the defendants are here and now assigned as error by said defendants."

"FIFTY-FIFTH EXCEPTION.

"And be it further remembered that after said court had charged said jury the said jury retired to consider their verdict, and returned into court the following verdict:

"Circuit Court of the Fourth Circuit, Territory of Hawaii.
Territory of Hawaii,

vs.

Watanabe Masagi &
Funakoshi Tatsugoro.

We the jury in the above entitled cause, find the defendants
guilty of murder in the second degree.

A. B. LOBENSTEIN,
Foreman."

"And thereupon the said defendants excepted to said verdict
as being contrary to law and the evidence, and to the weight of
the evidence, and gave notice of motion for a new trial." Stenog-
rapher's notes p. 271.

"And thereafter and within due and proper time said defend-
ants moved said court to vacate, set aside and annul said verdict.

"Said motion was made upon the grounds and for the reasons
contained in the written motion for a new trial in said cause
filed, which said motion for a new trial is hereby expressly
referred to, made a part of this bill of exceptions and incorpor-
ated herein, as fully as if the same were completely set out.

"Said motion having been argued and submitted to said court
for decision, said court denied the same and the whole thereof,
to which said ruling of said court said defendants then and
there duly excepted, and said defendants here and now assign
said ruling of said court as error." Stenographer's notes, p. 272.

Before the bill of exceptions was prepared, the clerk of the
circuit at the request of the defendants' attorney transmitted the
papers filed in the case to the clerk of this court. Precisely
what papers were transmitted does not appear, no list of them
having accompanied the letter of transmittal. Such a list ought
always to accompany a letter transmitting court papers. It
appears that Mr. Bitting, as attorney of the defendants, caused
whatever papers were sent here to be sent back to the clerk of
the Circuit Court at Hilo for use in a petition for *habeas corpus*
brought by him in behalf of the defendants, and that upon the
failure of that application, the papers, again with no accom-
panying list or description, were returned by the clerk of the
Circuit Court to the clerk of this court. The transcript of the
proceedings was, by leave of the Chief Justice, taken from the

files here by Mr. Cathcart, one of the attorneys who presents this bill of exceptions, for the purpose of preparing his brief. For a considerable time this transcript was missing, but finally was produced by Mr. Davis, the other attorney for the defendants, from his office, he stating that he had placed it for safe keeping under lock and key, but had forgotten the fact or the place of its deposit. The attorneys who appeared for the defendants at the trial do not represent them in this court.

Under the circumstances, the discrepancy between the transcript, which by the bill is expressly made a part thereof, and the bill, in respect of the failure of the former to show the filing of certain papers which the latter avers have been filed, may properly be resolved in favor of the correctness of the transcript, which was made from stenographer's notes taken at the time, and more particularly so when the transcript conforms to the clerk's record upon the subject.

The absence from the record of the second motion to quash the indictment, including the challenge to the array, as well as of written instructions requested by the defendants, or given to the jury, and of the defendants' motion for a new trial, does not authorize the inference that those papers were ever in the files of the court. Mr. Cathcart informs the court that he thinks they were there at the time that he prepared the bill of exceptions, but he cannot positively say that they were. It is impossible to say what has become of the papers which were clearly once filed in the case and are not now on the files. Attorneys, in examining the papers of the court during the conduct of a case, may often get them mixed up with their private papers and then mislay or lose them. It is therefore desirable in important cases in the future that counsel, in preparing a bill of exceptions, adopt the practice elsewhere common, and frequently prescribed by rules of court, of incorporating in the bill copies of such papers as they rely upon.

The motion of the defendant Watanabe for a separate trial is based on his affidavit setting forth that the preliminary examinations of the defendants were separate; that the evidence then

presented against this defendant differed from that presented against the other defendant and was contrary to it; that the defendants had different defenses; and that the evidence against the other defendant would be incompetent against this one, and would prejudice and injure him; that in a joint trial this defendant would be prejudiced in his right to challenge, and could not have a fair and impartial trial.

We see no error in the denial of this motion; ordering of a separate trial in such cases being a matter within the discretion of the court, and the evidence in the case does not show that a joint trial was prejudicial to either defendant. *The King v. Paakaula*, 3 Haw. 30; *Rex v. Tin Ah Chin*, 3 *Ib.* 90.

The motion for continuance is based upon the affidavit of the attorney, Mr. W. H. Smith, alleging that one Mrs. Nakamura, a material witness for the defense, who had been subpoenaed, resided at a distance of eighteen miles in Olaa, and if present, would testify to facts showing an alibi. The denial of this motion on the ground that there was sufficient time to get the witness was not error. It does not appear that there was not ample time to obtain the witness.

Upon the present showing the first motion to quash the indictment is the only paper not before us which is referred to in the bill as filed in the trial court, and also is shown either by the transcript or clerk's records to have been filed. The grounds of that motion are not set forth in the bill, and do not appear elsewhere. Error can not be inferred from the mere denial of the motion; nor can it be based upon grounds not stated.

The same is true of the instructions given, but which are not shown.

The defendants, however, claim that error appears in the record from the fact that it does not contain the instructions or show that there was a written consent that the court should charge the jury orally. The case cited to sustain this claim is *Hopt v. Utah*, 114 U. S. 488, which was a writ of error to reverse a judgment in the Supreme Court of Utah which affirmed upon appeal from

a district court of Utah a judgment and sentence of death upon conviction of murder.

The statute of Utah required, as does that of Hawaii, that the charge to the jury "be reduced to writing before it is given, unless by mutual consent of the parties it is given orally." The statute further required that "within five days after judgment upon a conviction the clerk must annex together and file the papers necessary to constitute the record, including '4. A copy of the minutes of trial; 5. A copy of the minutes of the judgment; 6. The bill of exceptions, if there be one; 7. The written charges asked of the court and refused, if there be any; 8. A copy of all charges given and of the endorsements thereon.'"

The court having held (104 U. S. 631,) that "the giving, without the defendant's consent, of any oral charge or instruction to the jury, is an error, for which judgment must be reversed," held, when the case came up again on error on a second conviction, that "the requirement of the statute that the clerk of the court in which the trial is had shall include, in making up its record, a copy of all written charges, as well as of the minutes of the trial, is equally positive. * * * The record must either set forth the charge in writing, or a waiver by the defendant of such a charge. If it does neither, it fails to show what is made by express statute an essential requisite to the validity of the conviction, and contains upon its face a fatal error, of which the defendant may avail himself by appeal, without tendering a bill of exceptions. The duty of making up a complete record is the duty of the clerk; and the duty of seeing that the record contains everything that actually took place, necessary to support the conviction, is the duty of the district attorney. If the copy of the record made up by the clerk of the district court, and entered by the defendant in the Supreme Court of the Territory, was defective in a material point, the district attorney might have moved in the latter court to have the defect supplied by *certiorari* or other proper process. The defendant and his counsel were under no obligation to cure, and cannot be held to have waived, any defect in the record, but

were entitled to take advantage, either in the Supreme Court of the Territory, or in this court, of any error apparent upon the record as it stood in that court. Applying these principles to the record before us, the conviction cannot be supported. The record merely states that the court charged the jury, and does not state whether the charge was written or oral. If the charge was written, it should have been made part of the record, which was not done. If it was oral, the consent of the defendant was necessary, and that consent does not appear of record, and cannot be presumed." *Ib.*

Our statute prescribes that "unless the parties to the cause on trial either in person or through their attorneys shall file therein their written consent that the court may charge the jury orally, it shall be the duty of the court, except as provided in the next succeeding section, to reduce to writing and read its charge to the jury and the manuscript of such charge, signed by the court, shall be filed in the cause, and shall constitute a part of the record thereof. Whenever, and as often as the court shall depart from such duty, either party to such suit shall be entitled, as a matter of right, to demand and have granted a new trial of such cause." Sec. 1356, C.L.

"It shall be the duty of the stenographer in such case to transcribe his notes of such charge within one week thereafter, and to file the same, duly certified in said cause, and such transcript may thereafter be used and referred to in like manner as though the same had been written, charged and filed by the court, as provided in the last preceding section." Sec. 1357, *Ib.*

"It shall be the duty of the counsel for the respective parties to a cause, to furnish the court with a written memorandum of their request for the charging of the jury upon the points of law involved therein, and it shall not be incumbent upon the court, in cases where the parties are so represented by counsel, to charge the jury upon the law, unless thereto so requested in writing." Sec. 1358, *Ib.*

"All written requests for instructions shall be filed in the cause, and shall form a part of the record therein; and the court shall in no case orally qualify, modify or explain the same to the jury." Sec. 1359, *Ib.*

The Utah case, having been brought up on error, required the court to look through the entire record to ascertain whether it showed error; but the present case is on exceptions, which do not require examination of the record further than it is presented for the purpose of sustaining the exceptions. As the defendants took no exception to failure of the judge to reduce his charge to writing, it is to be inferred that the charge was reduced to writing or taken down by the stenographer. In either case it could have been obtained and presented with the bill of exceptions, if the defendants' attorneys, on discovering its absence, had made proper application to the Circuit Court. That was the course to follow, if it was desired that this court say whether the charge was erroneous or not. *Buckman v. Whitney*, 24 Cal. 267; *Tomlinson v. Funston*, 1 Iowa 544; *Lobdell v. Marshall*, 58 N. H. 343; *Tabor v. Judd*, 62 *Ib.* 292.

A similar course should have been taken to present copies of requested written instructions, if any there were, filed and refused by the court. The absence of such requested written instructions, or of any showing from the defendants' attorneys at the trial that they were made and filed, justifies the inference that none were made or filed.

In *Clune v. U. S.*, 159 U. S. 590, (40 L. E. 270,) it was claimed that the verdict was against the evidence. The court said that the contention could not be sustained "unless all the testimony, or all upon some essential fact, is presented." The court further said in that case: "Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us." The journal entry showed that the jury were brought into court and announced that they had not agreed upon a verdict, and that the judge thereupon further instructed the jury by reading written instructions to them, to which the defendant's attorneys excepted. The court declined to consider the exception, on the ground that "no particular proposition is called to the attention of the court."

In *Nelson v. Flint*, 166 U. S. 276, (41 L. E. 1002,) it is stated that "the instructions which were given are not copied

in the record, nor is there anything in the bill of exceptions as to how long after the court had finished its charge to the jury this instruction was asked." The court therefore declined to consider whether there was error in the refusal to give the instruction presented, saying, "It does not affirmatively appear that it was presented under such circumstances as to demand consideration on the part of the court."

In *South Carolina v. Wesley*, 155 U. S. 542, (39 L. E. 254,) the circuit judge had filed an order overruling the plaintiff's motion to dismiss the proceedings for want of jurisdiction, and giving his reasons in that behalf. The court said: "It is difficult to deal with such a record as this. The order of April 16 was entered nine days after the return of the verdict, and apparently no exception was preserved to its entry. What passed upon the trial does not appear, as no bill of exceptions was taken." The court held that the defects in the record could not be supplied "by reference to the transcript of the record in a case pending in another court to supply defects in the records of a case in this court."

We therefore decide that the defendants' contention that a new trial must be granted in consequence of the disappearance or absence of certain papers from the files cannot be sustained.

In order to consider the questions of law presented at the trial it was neither requisite nor proper to file in this court the exhibits of the swords, kimonos, piece of cloth, pants, shirt and knife, nor was the map which was used in evidence required to be exhibited to us for the purposes of this case.

"A bill of exceptions should only present the rulings of the court upon some matter of law—as upon the admission or exclusion of evidence—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved." *Lincoln v. Claflin*, 7 Wall. 136.

In addition to exceptions to denial of the motions to quash, for separate trials and for continuance, for a new trial, and to instructions given and refused, forty-eight exceptions were

taken concerning the evidence and to rulings upon the examination of witnesses, an exception to the verdict as "contrary to law and the evidence and the weight of the evidence," and an exception to the sentence which was imposed.

The exceptions to the rulings concerning the evidence for the prosecution of the witness Kodama Katsutari are as follows: The witness, having testified that on the evening of July 24 he had seen the defendant Funakoshi, was asked to relate the circumstances of his coming to meet that defendant and then after objection by defendants testified that in response to certain information he went into the room where he met said defendant who said to him, "You come to ask for some money to repay you some money due you," and answered, "Yes, sir, I came to ask for some money, because I loaned it." The witness testified that he loaned the money to a woman Nakamura Tokue living in Funakoshi's house who had come to the witness' house and asked him to loan her fifty dollars; the witness told her that he had no money but might get it from somebody and that he borrowed it from Motohiro and then loaned the money to Tokue. That it was concerning this money transaction that the witness talked with the defendant Funakoshi on that evening. When Funakoshi asked the witness if he came to get the money to repay the loan he was answered, "Yes, is anything the matter if I ask for the loan," the defendant said "What are you talking about; this woman is made out of gold I don't see why she went and borrowed any money," referring to the woman Nakamura Tokue. The witness went on to recite in full the rest of the conversation.

Exceptions (6, 7, 8 and 9) were to the witness' testifying as above that he had information, in response to which he went to defendant's room, and to his conversation there with the defendant, and to his testimony that he negotiated the loan for Tokue. The witness having testified in cross-examination that he was afraid of Funakoshi and the ones that were under him, was asked on redirect examination to explain that,—gave as his reason that when he was "taken back to Kagatani's house he said

he would be a friend of mine if I obeyed him, but if I did not obey him he said that he do something for which he would be hung, or something big would happen to him," and further in answer to a question, "Will you explain what you mean when you say that Funakoshi had a lot of people under him, what were they doing under him," testified, "I do not know what they did, but they just run around town, some of them wrestlers I do not know what their occupation is," and to the witness' further testimony in response to the question, "Who is over them," that he "thought it was the man who owned the house who owns Funakoshi's house in which house these people lived."

Exceptions (10, 11, 12 and 13) were taken to the foregoing testimony on cross-examination.

Exceptions (14, 15, 16, 17, 18 and 19) to the rulings concerning the evidence for the prosecution of the witness Honda Toyodo were as follows:

The witness testified to a conversation she had with Motohiro about a money matter while Watanabe was in the room although she could not state exactly "whether it was about this money matter or not," after the conversation that she and Miyamoto went to raise money coming down to Hata "to Hata one in rear and one in front street" in order to raise money, one thousand dollars; that she went twice the same day to Funakoshi's, the second time seeing Funakoshi, Watanabe, Seo and two other people and Motohiro, several persons being downstairs and several above in the house. She testified to the conversation in considerable detail. The defendants excepted to all the foregoing testimony of this witness and to the denial of the court of their motion to strike out the evidence of the conversation concerning the money "based upon the promise of Watanabe between Miyamoto and Motohiro and this witness".

In the evidence for the prosecution of the witness Hata Mitsuro exceptions (20, 21, 22, 23 and 24) were taken by the defendants as follows:

The witness having testified that he saw Funakoshi on the

morning of the previous July 25 at Funakoshi's house and also that he saw Motohiro that morning at the same house upstairs in a small room and asked to explain how it was that he went there then, answered "The reason I went up there is Honda was called up to Funakoshi's house and after Honda came back asked me to raise the sum of one thousand dollars." The court denied the motion to strike out this answer. The witness having testified that after this conversation with Motohiro and in pursuance of it "he was trying to raise the money" being "the sum of one thousand dollars" and that this money was "for Motohiro", the defendants excepted to the denial of their motion to strike out that evidence, and the same with reference to the witness' evidence of the fact that he had a conversation that day with Miyamoto.

Defendants' exceptions 25, 26 and 27 relate to the proceedings in which the jury viewed the premises. As appears from the transcript of record (p. 65), the court remarked, "It is suggested to the court by members of the jury that they would like to view the premises and in as much as this is a capital case and every element and opportunity ought to be given for the jury to have element of light——

DEPUTY ATTORNEY GENERAL. I think it would be better to go down now, so that the jury could be put in possession of all the facts.

Mr. Le Blond agrees.

MR. ROSS. If the court please, in connection with this matter when the jury goes down there the defense only desires that the protection of the law be observed.

Discussion of the matter.

THE COURT. The court, upon an agreement of counsel, went to view the premises at 11:20 A. M.

Proceedings on premises.

THE COURT. The sheriff has been sworn.

MR. ROSS. Defense objects to any questions asked by the Attorney General of the sheriff, jury can ask any questions.

THE COURT. Objection overruled and exception allowed."

Thereupon in response to questions by jurors the sheriff described to the jury precisely in what position the body was found, its appearance when found, the time that he went there and the occasion of his going upon receiving a telephone message from officer Overend, what he found in the room, the fact that he found a number of Japanese in the room including the two defendants; also in answer to questions by jurors, officer Overend described the conditions of things as he found it in the room where the body of deceased was lying. The court as shown by the transcript "went to view the premises at 11:20 A. M. (*Ib.* p. 65). "Session resumed in the court room at 12:25 P. M." (*Ib.* p. 70.)

Upon the view at the premises the defendants objected to the sheriff answering the questions of a juror as to the location of the body when it was found "unless he was present at the time the body was first found" or describing the position, and objected to the officer describing the position of the body as he saw it when he first arrived there.

The record shows that the attorney for the defendants Mr. Ross was asked by the court "Have you any questions to ask while we are all here?" "Mr. Ross. I would like to ask the sheriff one question," which he proceeded to do.

At a later stage in the trial the court said to the jury, "After examining the authorities as well as possible during the hurry of the trial, I have found that evidence taken on the scene of the alleged crime is not admissible. It is therefore all ordered stricken from the record, and, if the prosecution wish to get the benefit of it, they will have to produce it in the same manner they would any other evidence. I will therefore say, gentlemen, that you will in all respects disregard any statement made to you or by you while viewing the scene of the alleged homicide for which these defendants are now on trial before you. Authorities are not uniform as to the admission of such evidence and as we have no statute on the subject, all you are permitted to do is to view the premises in silence. If the prosecution wish to avail themselves of any evidence they must adduce it in open

court. While the defendant and his counsel were present during the viewing of the scene of the alleged homicide, yet I deem it in the interests of justice to exclude everything excepting the viewing." (*Ib.* p. 91.)

Defendants excepted (exception 33) to the foregoing statement by the court and "to the striking from the record and instructions given to the jury at this time."

Defendants' exceptions 28, 29, 30, 31, 32 and 33 relate to rulings concerning the evidence for the prosecution of the witness Minato Kanzo Buro he having testified that on July 24 and 25 he was living in Funakoshi's two houses, living in the smaller of Funakoshi's two houses running errands for him and others, cooking for Nakamura Tokue who was Funakoshi's concubine, and that Funakoshi was "a professional gambler, extorter, blackmailer;" that about midnight of the 24th, Funakoshi came to the house and woke him up passing witness' room and going to Nakamura Tokue's room turned down her mosquito bar and waking her up, asked her whether she had ever borrowed money from a carpenter and if she went to Kodama's room with that carpenter; then Tokue answered that she never did and was never in Kodama's room; that Funakoshi then said that she was lying and started to beat her; that witness then went into his room to change his clothes and after changing them they came out and Funakoshi was leading Tokue out and "told me to bring all her clothes to his house." Defendants objected to the foregoing conversation. The witness having testified that Funakoshi had told him to go upstairs to watch both of them was asked whom he meant by both of them. The defendants excepted to the allowance of the question, the answer to which was "It was Nakamura Tokue and Motohiro was the only persons upstairs." The witness having testified that he had been told by one Seo in the presence of the defendants and others "to go down and hurry up and ask him to have that money in a hurry the Kinau was leaving in just a little while" and that "this money for Motohiro to give to Funakoshi," was asked towards the end of his direct-examina-

tion "How much money were you to go and get if you know," answered "thousand dollars," which answer defendants objected and excepted to.

On cross-examination of this witness objection of the prosecution was sustained to the question whether the witness had been confined in a cell or had the privileges of the grounds.

In the redirect-examination of the witness defendants excepted to the court allowing the witness to be asked by the prosecution and to testify what the errands were for to which he had referred in his testimony in chief.

Defendants took exceptions 34, 35 and 36 to rulings upon the evidence for the prosecution of the witness Nisawa. The witness, a hack-driver, having testified that he saw the defendants July 25 at Funakoshi's house and that he saw Motohiro there that evening in a small room upstairs where the defendants were and that after taking a message upstairs to Funakoshi went downstairs, was asked "What took place immediately after that" to which he answered "I heard a gurgling noise upstairs." Defendants excepted to the refusal to strike out this answer as not responsive, and excepted to the evidence of the witness that he was asked to go upstairs to see what was the matter.

In cross-examining this witness defendants excepted to the refusal of the court to strike out an answer of the witness to one of their questions as voluntary statement and not responsive and also excepted to the refusal of the court to allow them to ask the question "Could Seo's wife from where she was sitting see the stairs," the prosecution having objected to this question as calling for a conclusion of the witness.

Two exceptions (37 and 38) were taken by the defendants during the cross-examination of the witness Hosatimie for the prosecution, namely, to the refusal of the court upon the objection of the prosecution to allow the defendants to ask the witness whether in his testimony before the committing magistrate at the examination of the defendants he did not testify that "as soon as he heard this gurgling sound he got and of course he

went near the door-way, the gurgling noise was going on then;" the objection by the prosecution to this question was, it assumes a fact not in evidence and the record does not show anything upon this subject. The further exception was to the refusal of the court to allow the witness to be asked whether he did not testify in the preliminary examination in answer to question "How long did that lady sit in the room where the deceased was when you got there", and you said "it was all the while I was there, when I went in Funakoshi asked me to eat supper, I was in there all the while and I had supper." The objection of the prosecution to this question was that it "was meant to impeach him on this ground."

Two exceptions (39 and 40) were taken to the evidence of Nakamura Tokue to the witness testifying that Funakoshi on the night of July 25 came to her house, tore the mosquito netting down, cut her neck and told her to get up striking her three or four times, and to the conversation which then occurred between the witness and Funakoshi in which Funakoshi told the witness to call Motohiro and there was talk about the thousand dollars which Motohiro was asked to produce; what was said in the presence of Funakoshi was excepted to.

Exception 41 to the evidence of the witness Morita Kizo was to the refusal of the court to strike out an answer of the witness explaining the number of times that the defendant Watanabe on July 25 came to the house of the witness and that he came and went naked.

Exception 42 was taken to the evidence of the witness Miyamoto that after a certain conversation with Motohiro the witness and Honda went to Noeke's house.

Witness McKenney having been called by the prosecution to testify as a chemist, upon the result of his examination of the charred remains submitted to him by the sheriff, testified that he had been a chemist for fifteen years, was not a graduate from any institute, was a licensed druggist. Defendants objected, that the witness was not shown to be an expert and excepted (exception 43) to the overruling of their objection. The wit-

ness thereupon testified that he found animal charcoal in the charred remains, which from comparative tests and chemical tests he "would state had been produced by the charring of blood" and it was impossible to say that it was human blood.

Dr. Holland having been called for the prosecution testified that he had been for twenty-five years a physician and surgeon, graduating from the Atlanta Medical College. The court asked the witness the following question: "Supposing, doctor, that in the right side of the neck an open wound is $1\frac{1}{2}$ inches to 2 inches long, it passes through the neck severing the carotid artery and external jugular vein, it comes out at a portion back of the neck and makes a groove in the vertebrae on the right side of the neck, which hand would an ordinary man, and in your opinion would be used most likely? The right hand or the left hand in the infliction of a wound by himself?" The defendants excepted (exception 44) to the overruling of their objection to the question on the ground "that it did not call for expert testimony and was not based upon anything in this case."

The defendants in cross-examining this witness asked him the following question: "Suppose that the evidence in this case will develop the fact that the deceased within a half an hour prior to the time of his death went down the stairs, out into the yard into the rear house, came back into the house and walked upstairs unaccompanied or unassisted by any one and went into his room and was found there with a wound in his neck at the right side about two inches in length, and also a wound at the right and back of the neck, the man lying prone on his face, left hand extended and the right hand at an angle of 45° , lying on the right side of the face, with the knife, exhibit 'I', lying one and half feet at his right side and about ten inches from his elbow under a cloth on the floor, state whether or not the wound could have been inflicted by a man himself?" The prosecution objected to this question on the ground "that it assumes a fact not in evidence."

The defendants excepted (exception 45) to the sustaining of this objection.

Defendants excepted to the refusal of the court to grant their motion to strike out the testimony of the witnesses Hata, Honda, Kodama, Kobe and Tokue wherein they testified as to extorting money from the deceased Motohiro—for the reason that the same is incompetent, irrelevant and immaterial, and that the Territory did not make the connection that they promised the court when the court admitted the testimony and also to the refusal of the court to strike out the evidence of the witness Hata for the same reason and further excepted to similar motions with reference to the testimony of the witnesses Kodama, Kobe and Tokue; and to the refusal of the court to strike the testimony of the witness Tokue of the personal injuries that she had received. The court in overruling this motion gave as reason "among other things that counsel failed to make these motions at the conclusion of examination in chief of each of the witnesses and, in the absence of such motion, proceeded to cross-examine the witness in detail and at length." The foregoing exceptions are numbered 46, 47, 48, 49, 50 and 51.

Exceptions 52 and 53 were taken by the defendants upon the cross-examining of their witness Mrs. Seo, namely, to allowing the prosecution in cross-examining her to ask the question "Had Motohiro ever been into that house to your knowledge" to which the witness answered, "I do not know"; and to further question on cross-examination "By the way, you are the wife of a man by the name of Seo, who has evidently been indicted by the grand jury for conspiracy growing out of this transaction, are you not?" to which the witness answered that she was.

In argument defendants' attorneys laid much stress upon the court taking the jury to view the premises where the crime charged was said to have been committed, and upon what took place there as above described. It is insisted that the proceeding was illegal, amounting to holding court in a place unauthorized by law, and that the effect on the jurors of hearing the evidence there presented could not have been removed by the

court afterwards instructing them to disregard it. It is claimed that the consent of the attorneys of the defendants to this course was not enough, but that the defendants' consent, if that would suffice, which is doubted, was absolutely essential.

Exceptions twenty-five, twenty-six and twenty-seven, relating to this subject, when compared with the transcript, show that the twenty-fifth exception was simply to the sheriff answering the question of a juror concerning the location of the body when he found it "unless he was present at the time the body was first found."

The twenty-sixth exception was taken to the evidence of the deputy sheriff Overend upon his being asked to describe the position of the body as he saw it when he first arrived there, he having already testified that he was "the first officer to arrive here when the tragedy was reported." The objection made was "Object to that at that time here improper."

The twenty-seventh exception relates to the defendants' objection to any question by the attorney general to the sheriff, which objection the court overruled. It does not, however, appear that any questions were asked by the attorney general, but on the contrary, that all the questions were asked by jurors, with the exception of questions asked by the court as to which officer had got there first, and two questions asked by the defendants' attorneys in response to the inquiry of the court, "Have you any questions to ask while we are all here?" There is no basis, then, for this twenty-seventh exception.

The twenty-fifth exception taken to the sheriff describing the condition of the premises unless he was present when the body was found, and also the twenty-sixth exception to the deputy sheriff Overend, who is shown to have been the first officer present, testifying as to what he found "at that time," can not be regarded as exceptions to taking the jury to view the premises. It is to be observed that according to the transcript the defendants' attorneys agreed that the jury should view the premises. (p. 65 *Ib.*) The bill of exceptions, purporting to have been made from the transcript, contains what may perhaps be

regarded as a clerical error in using the word "argues" instead of "agrees." (Bill of exceptions, p. 22.) The following is the transcript (p. 65 *Ib.*):

"Mr. Le Blond agrees.

MR. ROSS. If the court please, in connection with this matter when the jury goes down there the defense only desires that the protection of law be observed."

The thirty-third exception relates to the direction of the court that the jury disregard any statements made to them while viewing the scene of the alleged homicide. This exception, however, was neither argued nor referred to in the defendants' brief, and requires no comment. As no exception, other than above mentioned, was taken to the legality of the view, or to the proceedings had there, questions concerning them are not before us, further than to say that the statements of the sheriff and deputy of conditions which they found on the premises were competent as far as the character of the evidence is concerned. Indeed, so far from excepting to the view, defendants' counsel expressly consented. The condition named in their consent, that "protection of law be observed," did not dispense with the necessity of excepting to any step which was claimed to be an infringement of the defendants' rights or a denial to them of the protection of the law. The exceptions which were taken were not such as can be sustained. It was competent to show the conditions of the *locus in quo* as found by the sheriff and deputy sheriff shortly after the event, and it was for the defense to show, if it were true, that those conditions did not exist at the time of the death of the decedent. Although the bill of exceptions does not require an adjudication of this matter, it has been the practice, we understand, in Hawaii, as it was at common law to allow the jury in criminal cases to view the premises.

The Supreme Courts of Georgia and Texas hold it to be reversible error in a criminal case for the court to permit a view. *Smith v. State*, 42 Tex. 444; *Bostock v. State*, 64 Ga. 639.

In *Com. Wealth v. Knapp*, 9 Pickering 515, the court denied

the prisoner's motion in a prosecution for murder, that the jury should view the house where the murder was alleged to have been committed, saying, "It does not appear to us that a view is necessary. It is attended with many inconveniences. We know not what the jury may hear and what impressions may be made upon them while they are taking a view. The case should be decided by the evidence given in court." At a second trial of the case, upon the request of the jury to visit the place, and counsel on both sides and also the prisoner consenting, permission was granted. The court did this with hesitation, regarding the course as without precedent, and doubting whether they could hold the prisoner to his consent. At the view the jury were permitted to take with them plans which had been shown and explained to them in court.

But in *The Queen v. Martin*, 1 Crown Cases Reserved 378, the court held: "It is always in the discretion of the court to allow a view or not, although such precautions as may seem to the court necessary ought to be taken to secure that the jury shall not improperly receive evidence out of court."

"In a criminal prosecution there can be no view without consent; and such was the practice before the 4 Ann. c. 16 *R. v. Redman*, 1 Keny. Rep. 384." 5 Bac. Abr. 375.

In the view above expressed it is unnecessary to say whether the instructions to disregard the statements taken at the premises would remove the effect of illegality of the proceeding, if such illegality were shown; or whether the fact that the deputy Overend afterwards gave in the court room the same evidence which he had given to the jury at the premises would remove illegality, if any there were, in his statements made at the premises, owing to the jury having heard what he said in the impressive surroundings of the *locus* and with the ocular demonstration which is so much more effective than description.

As above shown, a large number of exceptions were taken to the admission of testimony showing a conspiracy on the part of the defendants to extort money by blackmailing and false accusations; also showing the manner of living of the defendant

Funakoshi "with a lot of people under him" "who ran around town, some of them wrestlers," and to any evidence of conversations relating to any of such matters. The evidence objected to was admissible, notwithstanding that it showed other offenses.

"The rule is well settled that 'proof of other offenses may be admitted to prove scienter or guilty knowledge or to make out the *res gestae* or to exhibit a chain of circumstantial evidence of guilt in respect to the act charged.' Wharton's *Crim. Ev.*, Sec. 650." *The Queen v. Leong Man*, 8 Haw. 341; *Rep. of Haw. v. Tsunikichi*, 11 *Ib.* 344; *Rep. of Hawaii v. Yamane*, 12 *Ib.* 189.

"The fact that the testimony also had a tendency to show that the defendant had been guilty of Camp's murder would not be sufficient to exclude it, if it were otherwise competent." *Per Cur. Moore v. U. S.*, 150 U. S. 157.

In examining the record of testimony with reference to the exceptions taken to its admission, or refusal to strike out, or in the direction of the examination or cross-examination of witnesses, we see no reversible error.

It does not appear that any of the facts admitted in evidence against defendants' objection were irrelevant to the evidential facts on which the defendants' guilt might properly be based, nor was any of the evidence to which the defendants objected irrelevant for the purpose of showing either the main or subordinate facts. If in any instance irrelevant evidence was admitted it was not of a nature prejudicial to the defendants in the minds of the jury. .

Nor can the verdict be set aside on the ground that it is contrary to the evidence or is not sustained by the evidence.

The fact that a witness for the prosecution admitted in cross-examination the possibility of suicide was before the jury; it was for them and not for the witness to decide whether or not the evidence on the whole showed beyond a reasonable doubt in their minds that the defendants had committed the crime charged against them.

We overrule defendants' exception thirty-seven to the court

refusing to allow the defense to ask the witness Hosatani the question, "If you swore to that" (meaning a statement at the preliminary examination which he had testified that he did not remember,) "which is true, the statement that you made at that time or the statement that you made today?"

The same witness having testified for the prosecution, among other things, that he had massaged the defendant Funakoshi in a certain room in the defendant's house on the night of the alleged murder, and having heard a "gurgling noise" from the next room, after which the defendant Watanabe came in, saying "Done up; done up; wahine, dead; dead; dead;" that then Funakoshi looked into the room and returned and laid down, and having further described what was said by the defendants upon that occasion, and what occurred, as for instance, that the witness noticed blood all over in the inner room when he looked into it, said in cross-examination that Funakoshi and the woman there ate their food in the room, which the woman had brought in upon a tray, but that the witness did not know who carried the tray downstairs, and did not himself eat there after he began to massage, was asked by the defense if he did not testify at the preliminary examination that the woman in the room with Funakoshi was there all the while the witness was there, and that when he went in Funakoshi asked him to eat supper, and she was there all the while he ate. The thirty-eighth exception, which was taken to the refusal to allow this question, is overruled on the ground that the evidence sought to be impeached does not appear to have been sufficiently material to the issue. The rule is that "a party has the right to call witnesses for the purpose of contradicting material evidence given by a witness for his opponents." 10 Ency. Pl. & Pr. 280. As a consequence, the former testimony which is sought to be contradicted must be "material to the issue on trial." *Ib.*

The forty-third exception relates to the overruling of the defendants' objection to the chemist McKenney testifying as an expert upon his analysis of a charred cloth substance which was in testimony, in which he testified that he found on making

tests the appearance of blood, but whether human blood or not he could not say. We see no error in the ruling of the court admitting this witness as an expert upon this subject.

We will consider together exceptions forty-four and forty-five to the question which the court asked a medical witness for the prosecution, and the refusal of the court to allow the defendants to ask the witness on cross-examination a hypothetical question in the form proposed. There is no objection to the form of the hypothetical question asked by the court, and it was an appropriate question to ask of the medical expert.

The question ruled out which is above stated was objected to as assuming a fact not in evidence, and was ruled out by the court for the same reason, namely, as "not predicated upon the facts." It is erroneous to allow hypothetical questions unwarranted by any testimony in the case. "A question based on an assumption which the evidence neither proves nor tends to prove is misleading." Rogers on Expert Testimony, 2 Ed., p. 67. Defendants' attorneys have not pointed out to the court in their oral arguments or in their briefs the evidence on which the hypothetical question would properly be based. We think, however, that the question was objectionable in asking the expert witness to state his opinion on matters of such a general nature which do not authorize an expert opinion.

The following statement taken from the brief for the prosecution is sustained by the evidence, to wit:

"The evidence shows that the defendants were persons of exceedingly bad character, known to be gamblers, blackmailers and extortioners.

"That on the twenty-fourth day of July, nineteen hundred and two in the night time of said day, the defendants sent to the house of one Nakamura Tokue (w.) and demanded her presence before them.

"That they then and there accused said Nakamura Tokue with having had, prior to that time, criminal intercourse with said Motohiro and that she had borrowed a certain sum of money from said Motohiro.

"That at the time above mentioned said Nakamura Tokue

denied that she had had such criminal intercourse with said Motohiro but admitted that she and other friends of hers had borrowed from him the sum of fifty dollars.

"That these two defendants thereupon sent for said Motohiro and that he was brought to the house of defendants and there interrogated as to the accusation by them made against himself and said Nakamura Tokue and that he denied having had criminal intercourse with said Tokue, but admitted that he loaned her a sum of money, as alleged.

"That thereupon these two defendants cruelly maltreated both said Tokue and Motohiro, that they beat them and that said Motohiro was so severely beaten with an iron rod that he was left after said beating in a helpless condition and was so weak that he could not even assist himself down the stairs.

"That these two defendants threatened to kill both said Motohiro and said Tokue and said they would tear said Tokue to pieces and finally presented said Tokue and said Motohiro and each of them with a large knife and ordered and demanded of them that they cut each others right arm off, upon the doing of which, these defendants said that they would forgive said Motohiro and Tokue.

"That it was claimed by the defendant Funakoshi that said Tokue was his concubine and he gave that as his reason for beating and ill treating said Tokue and said Motohiro.

"That after said beating and maltreatment and threats to take the lives of these two parties, these two defendants informed them that they would kill them if they did not give them a large sum of money, in the case of the woman, two thousand dollars and in the case of the man, one thousand dollars.

"That these defendants sent for the clothing belonging to said woman and ordered the same to be burned and they confined the said Tokue and the said Motohiro in the house of said Funakoshi at Hilo from midnight of the twenty-fourth day of July, nineteen hundred and two until the time of the death of the said Motohiro the following day.

"That during the time of said confinement of said Motohiro and said Tokue, said parties, through their friends, attempted every possible means to raise sufficient money to satisfy the demands of these defendants, but failed in their efforts.

"That about twelve o'clock noon of the twenty-fifth day of July in said year, Tokue was sitting with the defendant Funa-

koshi and another Japanese in a room next to the one in which said Motohiro was confined.

"That just prior to that time, the defendant Watanabe had been seen to enter that room.

"That Tokue was in a position where she could see the defendant Watanabe if he should leave the room and that she did not see him leave the room prior to the death of Motohiro.

"That while sitting in said room with the defendant Funakoshi, she heard certain sounds which she described (p. 148, sten. min.) 'heard a noise like striking coming from Motohiro's room and then I heard a moan and gurgling. Then something fell, like a body. Then I heard some one walking in the room.'

"That after that the Japanese who was in the same room with the defendant Funakoshi and who was alleged to have been giving him, the said Funakoshi, lomilomi treatment, was requested to go to the door and look in the door of the room where Motohiro had been confined and see what was the matter.

"That just prior to this time and before said sounds had been heard, to come from said room where said Motohiro was, the defendant Watanabe had had a whispered conversation with the defendant Funakoshi, the only words of which intelligible to the witness were, 'All right.'

"That the witness Hosotani upon opening the door looked into said room and saw that the floor of said room was covered with blood, came back very much frightened and told the defendant Funakoshi that Motohiro was dead. Also suggested calling a doctor.

"Within a few minutes thereafter the defendant Watanabe came running back and said to Tokue, 'Done up. Done up. Dead. Dead,' referring to deceased.

"That after the discovery of the dead body of Motohiro in the room aforesaid, both of the defendants attempted in every way possible to manufacture evidence, so that in the event of the death of the said Motohiro being questioned in the courts, all of the persons present would testify, falsely, that he committed suicide.

"That they promised favors and rewards to the said Tokue if she would testify 'straight' as they called it and threatened her life in the event of her telling what she knew about the death of Motohiro."

Because there was evidence on which, if believed, a doubt of

the defendants' guilt might be based, we cannot say that such doubt ought to have arisen, or that it was in fact produced in the minds of the jury. The doctrine which in effect requires the opinion of the court to be substituted for that of the jury concerning the credibility of evidence, even when guilt is claimed upon circumstantial evidence alone, is not accepted by this court as law.

The evidence justified the finding that the defendant Funakoshi abetted the defendant Watanabe in the commission of the offense charged.

"Any person who not himself being present at the commission of an offense, abets another in the commission thereof, or procures, counsels, incites, commands or hires another to commit the same, which such other thereupon, in pursuance thereof, commits, is an accessory before the fact, to the commission of such offense." Sec. 27, P. L.

"Every person who aids in the commission of an offense, or is accessory before the fact thereto, is guilty of such offense, and shall be subject to punishment therefor, in the same manner and to the same effect as if he had been present at the commission thereof and actually taken part therein." Sec. 28, P. L.

The verdict was fully sustained by the evidence in the case.

The venue was shown to have been at Hilo where the court was held.

The defendants took exception to the judgment pronounced (transcript, p. 274,) stating no grounds for the exception. In their brief they claim that the court "before passing sentence should have asked them if they had anything to say why sentence should not be pronounced," and that "this the court failed to do." It appears from the transcript that the court, after learning from the defendants' attorneys that they had "no objection to sentence being pronounced at this time," interrogated the defendants as to their age, the length of residence in the Territory, and whether they understood that the jury had found them guilty of the death of the deceased, informed them of the sentence authorized by law, which was thereupon imposed. As we have repeatedly had occasion to remark in the discussion of

these exceptions, this case does not come up on error. No ruling was made by the court on the subject of the necessity of asking the exact question referred to, and the question is not before us.

The exceptions are overruled and the case is remanded to the Fourth Circuit Court.

M. F. Prosser, Deputy Attorney General, for prosecution.
Cathcart & Milverton and *George A. Davis* for defendants.

BECKY L. K. KALAMAKEE BY HER GUARDIAN, J.
W. KEIKI, *v.* HENRY WHARTON AND THE WAI-
ALUA AGRICULTURAL COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 11, 1904. DECIDED NOVEMBER 7, 1904.

HARTWELL, J., AND CIRCUIT JUDGES DE BOLT AND GEAR IN
PLACE OF FREAR, C.J., AND HATCH, J.

STATUTE OF LIMITATIONS—*acts of ownership under deed from a co-tenant purporting to convey the entirety—presumption of hostile nature of such acts when unexplained.*

Acts of ownership, such as fencing the land, cultivating a small part of it and using the rest for pasturage, when done by a person having a conveyance of the entirety from a co-tenant are presumed in the absence of other explanation to have been done in accordance with the estate purporting to have been conveyed to him, and to be hostile to the rights of the other co-tenant.

INFANT CO-TENANT—*requirement of statute of limitations.*

The statute applies alike to infants as to persons not under disability in requiring reasonable attention to the condition of their property, following *Thurston v. Bishop*, 7 Haw. 421.

Id.—fiduciary relation.

A grantee of the entirety from a co-tenant is not regarded as holding a fiduciary relation to the other co-tenant, a child of about four years of age at the date of the conveyance, merely because the child was brought up in the family of the grantee's mother who had married the child's grandfather, and was treated by the family as a kind of daughter, ("me ke ano kaikamahine").

Id.—failure of co-tenant to inquire concerning authority of the grantee for making use of the land amounts to a waiver of demand and refusal to be let into possession.

Acts of ownership done by one having color of title and presumably based thereon ought to be noticed by the other co-tenant and to have caused inquiry concerning the new-comer's source of authority. Failure to make such inquiry amounts to a waiver of demand and refusal on the part of the co-tenant to let her into possession.

Id.—directed verdict.

Uninterrupted and unopposed possession for over ten years under color of title, the possession being shown by fencing, cultivating and depasturing the land, with no evidence other than a grant of the entirety of the land from a co-tenant to explain the acts of possession entitled the defendants to a directed verdict in their favor, the plaintiff's action not having been brought within five years after the end of the ten years' possession.

PRACTICE—judgment non obstante—title of verdict.

No motion having been made before the trial judge for judgment *non obstante*, no question of law on the propriety of such judgment is presented by the bill of exceptions.

The court having upon the suggestion of the death of the guardian *ad litem*, by whom the infant's motion was brought, allowed the substitution of the name of a guardian, the verdict was properly entitled accordingly.

OPINION OF THE COURT BY HARTWELL, J.

This was an action to quiet title, the plaintiff claiming an undivided half of certain land situated at Waialua, in the Island of Oahu, containing about fifty acres, as heir of her father, who held under a conveyance of October 21, 1899, from Kamila, granddaughter of the patentee. The land described in the patent descended from the patentee to his son

and daughter as tenants in common. The son conveyed his undivided half of this land to Wharton, one of the defendants, by deed of December 3, recorded December 10, 1878, which purported to convey all of the land, and not merely the grantor's share.

The plaintiff is entitled to the undivided half of the land claimed by her, and the verdict in her favor must stand if there was no reversible error in the instructions given to the jury, or in the refusal to give instructions asked by the defendants, unless the grantor Kamila was disseized of the land by the course relating to it which was pursued by the defendant Wharton after he obtained his deed of December 10, 1878, and the disseizin continued long enough to bar action by Kamila or her grantee to recover possession of the land according to her estate therein as tenant in common. Kamila was born about the month of August of 1874, her mother dying shortly after, so that she was nearly four and a half years old at the time of her uncle's deed to Wharton, and became twenty years of age in about August of 1894. If she had then been disseized for a period of ten years, the statute which required an action to be brought by her to recover possession of the land within five years after she became twenty years of age would bar this action, which was brought January 11, 1900. The defendant Wharton, November 8, 1897, leased the land to the Halsteads for a term of twenty-five years, which lease they assigned to the other defendant, the Waialua Agricultural Company.

The defense is that on the facts shown by the undisputed evidence this action was barred by the statute, and also that the instructions that the court gave were not appropriate to the evidence, while those which were asked by the defendants and refused by the court were appropriate, and ought to have been given.

The land was granted by patent dated May 30, 1850, for the consideration of \$12.50, and is described in the patent as "kula," which is land having no water rights. Barenaba, a witness for the defendants, testified upon cross-examination that Kaahanui

and Kamaka, who were the patentee's son and daughter, occupied this land after Kanoena's death, the latter being the patentee of the land; and that he never knew of any interruption in that joint possession of Kaahanui and Kamaka. (Transcript, p. 52.) It is difficult to say from the testimony whether the witness, by the words "occupied" or "possession," did or did not mean residence. The patentee Kanoena married for his second wife the mother of the defendant Wharton, whose house was "less than ten chains" from his own. There he appears to have gone to live after his second marriage, and there his granddaughter Kamila was brought up. Wharton himself did not, however, live in the same house, but at a distance, as he says, of the judiciary building from the executive building. (*Ib.*, p. 73.) The land was uncultivated and unfenced, animals roaming about the country at large, grazing upon it, and nothing whatsoever conclusively appears to have been done upon the land by anyone until the year 1885, when the defendant Wharton ran a fence around three sides of it so as to include the adjoining lot known as the Kuemanu land; the Halstead fence, made in 1882 or 1883, having extended along the other side of both lots. Wharton then plowed and planted in melons, corn and pumpkins what one witness says was a "small strip," or about "one acre of the land," and which he himself says was "some acres." It is not clear from the evidence whether only one crop was planted, namely, the crop planted in 1891 or 1892, (transcript, p. 73,) or whether this strip of land was planted every year. He dug a well and made a windmill, either upon this land or upon the adjoining Kuemanu land, apparently upon the latter, his own testimony not referring to the well, and one of his witnesses, on cross-examination, places it upon the adjoining land. (Transcript, p. 33.) After he had fenced the land he took in animals of Chinese for pasturage at \$5.00 a head. At some time not clearly defined, some of the defendants' witnesses testify that Wharton had men at work on the land clearing it of lantana and bushes. In his own testimony he does not refer to this. For instance, the witness Puaiole

says that Wharton in 1881 was cutting down the lantana and also hiring men to dig a well. (*Ib.*, p. 24.) Wharton himself testifies that it was in 1885 that he got the use of the Kuemanu land, (*Ib.*, p. 68,) and that it was then that he planted the crop referred to and used the rest of the land for pasturage. (*Ib.*, p. 68.)

The jury undoubtedly would have been justified upon all the evidence in finding that it was not until the year 1885 that the defendant Wharton began to do anything with this land, other than that his animals, in common with those of other people in that vicinity, ran upon the land. March 8, 1895, a strip of this land was taken for a government road, and Wharton gave a deed of conveyance of it to the Minister of the Interior for the consideration of \$100. Nothing else appears to have been done with the land by Wharton than above mentioned until his lease to the Halsteads of November 8, 1897. Kamila never made any use of it.

As between the co-tenants under the common title of descent from the patentee, none of the acts if done by one of them which were done by Wharton would have justified the other in thinking that there was a claim of exclusive ownership. As between such co-tenants when "the co-tenancy is known or recognized, more significant acts or conduct would generally be required, for the co-tenant in possession would in such case naturally be supposed to be acting merely in the exercise of his own rights and not in denial of his co-tenant's rights. There may be other relationships of a more fiduciary nature, the recognition of which would require acts of a yet more significant character to bring home to the real owner notice of a hostile claim." *Smith v. Hamakua Mill Co.*, 13 Haw. 721.

But the case of a grantee coming into the land under a deed from one of such co-tenants purporting to convey the entirety is different. It can not be said *prima facie* that such grantee regards himself as a co-tenant. It must be remembered that Kamila's infancy does not affect the rule of law requiring reasonable attention to her property and rights. The working of

the statute of limitations upon the rights of infants is often a hardship, but it is clear that if it were not for the five years allowed by statute they would be barred like any other person not under disability. *Thurston v. Bishop*, 7 Haw. 421.

A reasonable attention on the part of the co-tenant to the condition of the premises would have shown her that the land had been fenced and part of it had been planted by some one else than herself or her uncle, the former co-tenant, and that the person doing this was Henry Wharton, living near by; and further, upon inquiry of him, it is to be inferred that she would then and there have learned that he claimed under his deed to be the sole owner, and that she would not be allowed by him to exercise any rights of ownership. In other words, that which was done upon the land was enough to put her upon inquiry, and to bring the case within the rule that "the circumstances must be such as to bring home to the ousted owner the adverse character of the possession, or be such as would bring it home to him if he paid the proper attention to his rights." *Smith v. Hamakua Mill Co.*, 13 Haw. 721.

In this way of looking at the matter Wharton's use of the land dating from 1885, when he fenced it, must be regarded as hostile to Kamila's rights, being explained in no other way than by his deed of conveyance of the land.

Probably he knew that the niece Kamila inherited her mother's share in the land and was a co-tenant with her uncle. He says in his testimony that he "thought he was buying the share of the little girl." (Transcript, p. 74.) He knew the source of his grantor's title and that Kamila was granddaughter of his grantee's father. Nevertheless he took the deed of the whole estate from the part owner, and therefore it can not be inferred that, if asked to do so, he would have admitted that he claimed only the right of a co-tenant. On the contrary, the inference is that he would have claimed all that the deed purported to convey to him. We think on the whole that in the absence of any showing to the contrary, Wharton must be regarded as having exercised the rights of a sole owner from 1885; and that

notwithstanding his relationship with the child Kamila, he is entitled to the presumption of law that the action that he was taking was that which his deed in fact, although not in law, authorized, and hence that it was hostile.

Acts of ownership by one admitting his co-tenancy and within the rights of a co-tenant would require no attention, although if done by one having color of title as sole owner they ought to be noticed by the other co-tenant because they would presumably be based upon the colorable title to the whole estate. Wharton was a new comer, and his use of the land was such as ought to have caused Kamila to ask by what authority he was there. This would have shown her that he was claiming and acting adversely to her right. Her failure to make the inquiry amounts to a waiver of demand and refusal to let her into possession. The case therefore presented all the requirements of adverse possession continued for ten years.

The result of the foregoing conclusions which we have reached is that the defendants' motion at the close of the case for a directed verdict in their favor ought to have been granted, and that the exception to the denial of the motion is sustained.

Referring to the defendants' claim to be entitled to judgment *non obstante*, no motion was made before the trial judge for the entry of such judgment, therefore no question of law upon the propriety of the judgment of the circuit court is before us on these exceptions. The facts are not sufficiently free from controversy to require this court to order such judgment.

The defendants' claim that the verdict is improperly entitled can not be sustained, the court having upon the suggestion of the death of the guardian *ad litem* allowed the name of the guardian J. W. Keiki to be substituted.

Examination of the instructions as given will show that they require considerable modification to conform to the view which we have taken of this case. Wharton's conveyance from Kaahanui gave him color of title, and the court in its first instruction of its own motion correctly instructed the jury, that "where a person enters onto land under a claim of title thereto by a

recorded deed, his entry and possession are referred to such title, and that he is deemed to have seizin of the land co-extensive with the boundaries stated in his deed, where there is no open adverse possession of the land so described in any other person." The court also at the defendants' request correctly charged that "if real estate is held in common, and one tenant assumes to convey the entire land by metes and bounds, his deed will furnish color of title."

Defendants' instruction nine was properly refused, since it was not true that the taking of the deed from Kaahanui conclusively established the fact that Wharton did not go into possession as a tenant in common, and that he was to be regarded as a stranger claiming title to the whole land under color of title. The proper modification of this instruction would be that in the absence of evidence to the contrary the facts mentioned might be regarded as shown.

But it is unnecessary to consider in detail the exceptions concerning the instructions. The exception to the refusal of the motion to direct a verdict is sustained and the case is remanded to the first circuit court for a new trial.

J. A. Magoon, J. Lightfoot for plaintiffs.

Castle & Withington for defendants; *C. W. Ashford* for defendant Wharton.

IN RE ASSESSMENT OF TAXES, HAWAIIAN SUGAR
COMPANY, LIMITED.

APPEAL FROM TAX APPEAL COURT, FOURTH DIVISION.

SUBMITTED OCTOBER 17, 1904. DECIDED NOVEMBER 7, 1904.

FREAR, C.J., AND CIRCUIT JUDGES DE BOLT AND GEAR IN
PLACE OF HARTWELL AND HATCH, JJ.

An assessment, made by the assessor and sustained by the tax appeal court, of the lessors' interest in certain land at more than the amount of eight years' rental, is affirmed under the circumstances set forth in the opinion.

OPINION OF THE COURT BY FREAR, C.J.

This is an appeal from the tax appeal court, fourth division, sustaining, on appeal from the tax assessor, an assessment of \$400,000, made as of January 1, 1903, upon the lessors' interest in 3,933 acres of cane land held by the appellant, the Hawaiian Sugar Company, Limited, under a lease for fifty years, beginning January 1, 1889, the lessee being obliged by the terms of the lease to pay all taxes on the demised premises. The question whether the assessment was properly made against the lessee, instead of against the lessors, is not raised, and perhaps could not be raised, under the circumstances, at the present time. *Hilo Sugar Company v. Tucker*, 8 Haw. 148. The company returned the land at \$300,000 and appealed to the tax appeal court as to all over that amount, namely, \$100,000, but afterwards abandoned its appeal as to \$30,000, and the question now is as to the remaining \$70,000. The land had been

assessed at \$400,000 and the assessment had been accepted by the company for a number of years previously, except that in 1902 the assessment was reduced, as the result of a compromise, to \$300,000.

The appellant's present counsel come into the case for the first time in this court. They rely in part upon the rule, prescribed in C. L., Sec. 820, that the assessment value in cases of this kind should be "eight years' rental" unless that would be "manifestly unfair or unjust," and contend that at most the assessment should be no greater than eight years' rental and that it should be less on the ground that that amount would be manifestly unfair or unjust. The rent of the land in question consists of percentages of the sugar produced on it, varying according to the amount of sugar produced, and for the previous five years had average in value \$42,500 a year. This rental would require an assessment of \$340,000, if the eight year rule should be applied. Appellant's counsel, in their original brief, contend that the valuation of the lessors' interest should be no greater in proportion to their income from the land than the company's invested capital plus the value of the land and the annual expenses is as compared with the profits from its business, and they estimate the value of the lessors' interest on that basis at \$302,357.72; but in their supplementary brief they point out an error in their estimate, the correction of which would make the valuation \$374,800. They contend, however, that the valuation of the lessors' interest should be less than that of the company's property in proportion to income, for the reason that the lessors' income is derived from "naked land, unimproved (save as by the lessee) without a cent of value added, without an iota of risk in production of income, without a cent of expenditure, or a moment of labor or attention to make the enterprise pay," while the company obtains its profit only by the expenditure of a large amount of capital and thought and energy and the incurrence of much risk. It seems to us that these considerations weigh in the opposite direction. The fact that the lessors obtain their income simply as rent for the

land, without expenditure, labor or risk, is an element that adds to the value of their interest in the land. In such case a given amount of income would be a fair return upon a larger valuation than where such expenditure, labor and risk are involved. However, a comparison between the income of a sugar plantation and the rent of a tract of land is of little if any assistance in determining the value of the lessors' interest in the land.

The evidence as a whole in this case is not very complete or satisfactory, but it tends to support the finding of the tax appeal court, or at least does not clearly show that that finding was erroneous. The decision of that court should not be disturbed unless good reason appears for doing so. The evidence shows that the land in question has an area of nearly 4,000 acres, and that it is the finest cane land, and is supplied with water from mountain streams. There is evidence that some years ago, when the method of assessing sugar plantations was different from that at present required by the statute, cane land was assessed at from \$100 to \$300 an acre. If the lessors' fee simple interest, subject only to the lease, should be valued at the rate of \$100 an acre, the valuation would be \$400,000. The evidence shows also that the lessors' income averaged \$42,500 net a year, the lessee paying the taxes. This would be 10½ per cent. net on \$400,000. The lease was made some years ago, when conditions differed greatly from what they are now. The land has been somewhat improved by the lessee, and the sugar company which holds it is one of unusual prosperity. There is much reason to believe that an investment of \$400,000 in the purchase of the lessors' interest would be one of unusual security.

After the case came to this court, a deposition of one of the witnesses before the tax appeal court was taken and filed as new evidence by consent of the court and counsel on both sides. The appellant contends that this materially changes the evidence upon which the tax appeal court based its opinion,—principally because the witness says that when he replied in the affirmative in the lower court to the question whether he would

advise the lessee to purchase the land at \$400,000, in case the lessors should offer it at that figure, he meant to include certain other land, which appears to have an area of 800 acres, which he supposed was included in the land in question, but which it is claimed was returned and assessed separately as pasture land. At just what amount that land was returned and assessed does not appear, but if it was assessed as pasture land, it was probably at such a small amount as would not make a great difference in this case if it should be deducted from the \$400,000. The case would be altered materially only in case that land should be considered, as perhaps it should be, as available for cane and about to be utilized by the lessee for that purpose. But, however that may be, the witness did not say in the lower court that \$400,000 was all that the land that he had in mind was worth, nor did he say in his deposition that the land now in question was not worth \$400,000. On the contrary, when the question of the value of the land was put to him in the lower court by the appellant's counsel he did not reply, and the question was not pressed.

Another point urged by appellant's counsel is set forth in their supplementary brief, to the effect that since preparing their original brief they have discovered from an examination of the papers in the case that the appellant returned this land twice, namely, once under Schedule A, real property, \$300,000, and once under Schedule C, lessee's return of property leased, land \$300,000, improvements \$318,620.42. It is contended that this occurred through an oversight, and that the lessee has already paid its taxes on the \$300,000 returned under one of these schedules, and that if it is now required to pay the taxes on the other \$300,000 it would be paying in all on \$600,000, or \$200,000 more than was fixed by the tax appeal court, and that consequently it should not be required to pay on an additional \$100,000. In support of this view reliance is placed upon the decision in *Hilo Sugar Co. v. Tucker*, *supra*, where the court held that the lessee could not properly be assessed on its interest, which it had not returned, after having

returned and been assessed upon the entire property as including both lessor's and lessee's interest, that is, as if there had been no lease. Such is not the case here. There is nothing to show that the \$300,000 returned or the \$400,000 assessed on the land was considered as including the lessee's interest. On the contrary, there are strong indications that it was considered as covering only the lessors' interest. For instance, the assessment was determined largely with reference to the income derived by the lessors alone, and the questions in regard to the value of the land were put with reference to the amount that the lessee would pay for it if it were offered by the lessors, and of course the lessee would not purchase what it already had, its own interest. Moreover, it does not appear upon what the lessee has already paid taxes. The fact that it returned, as was proper under the statute, the lessors' and lessee's interests separately, under the appropriate schedules, and repeated both amounts in the summary in its return, and that no suggestion was made by it or its counsel in the lower court that it had made a mistake, coupled with the fact that it actually paid the taxes on one of these items, would seem to indicate that it knew what it was about and intended to do what it did do. Moreover, the return shows that it at first valued the improvements at \$618,620.42 instead of \$318,620.42, and then changed the amount to the latter sum in both Schedule C and the summary, thus lending color to the appellee's contention, which has some support also from the appellant's statements in its annual report, that the \$300,000 mentioned as the value of the lessee's interest in Schedule C was really the value of some of the improvements placed upon the land by the lessee. At any rate, the change in the figures would seem to show that the lessee's attention was brought to the matter, and that the figures finally inserted were inserted only after reflection. There is not enough before us now to enable us to hold that a mistake was made. There is not enough to show what the value of the lessee's interest was. We need not say whether if a mistake

were made we could now, at this stage of the case and in this proceeding, afford the desired relief.

It is suggested by counsel in their brief that if we cannot afford such relief now, we withhold the decision in the case until further opportunity may be had by both parties to fully present and argue the case on the new issue, and that if such a rehearing should be given, they would undertake to show that a mistake had been made in making up the return. We do not feel that we should do this under the circumstances. It is a suggestion to practically open the case and hear it in the appellate court as if this court were one of original jurisdiction, merely because of what is suggested, without the support of affidavits of facts, as a mistake of appellant itself which, if there was such a mistake, ought to have been discovered and brought to the attention of the tax appeal court, or at least to the attention of this court before the case was submitted by consent of the court a second time upon supplementary briefs after it had already been submitted on the original briefs.

The decision of the tax appeal court is affirmed.

Smith & Lewis and *L. J. Warren* for appellant.

W. S. Fleming, Assistant Attorney General, for appellee.

IN THE MATTER OF THE APPLICATION OF ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, FOR A WRIT OF PROHIBITION AGAINST THE HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, AT CHAMBERS, AND J. S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR.

ORIGINAL.

ARGUED OCTOBER 20-21, 1904. DECIDED NOVEMBER 7, 1904.

FREAR, C.J., HATCH, J., AND CIRCUIT JUDGE DE BOLT IN PLACE OF HARTWELL, J.

CIRCUIT JUDGES AT CHAMBERS—*independent jurisdiction in equity and probate matters, not impliedly repealed by Organic Act.*

The equity and probate jurisdiction of circuit judges at chambers existing under the Hawaiian constitution, which vested the judicial power in one supreme court and such inferior courts as the legislature might establish, was not impliedly repealed by the provision of the Organic Act which vested such power in one supreme court, circuit courts, and such inferior courts as the legislature might establish. Although the powers of judges at chambers are usually limited to matters incidental or ancillary to causes pending in court, judges at chambers, so-called, have in Hawaii not only such incidental powers but also independent jurisdiction in equity and probate matters. But such independent jurisdiction is exercised by such judges as courts of record, and not privately or summarily, —the phrase "circuit judge at chambers" being in such case merely a method of describing such courts.

CONSTRUCTION—rules of, applied.

In construing a doubtful provision of an act, other provisions, the act as a whole, and its reason and spirit, may be considered; also the circumstances under which it was adopted, the history which preceded it, and the consequences of proposed constructions; weight may be given to long continued, unquestioned and contemporaneous construction; if the provision is borrowed, the construction placed upon it previously may be considered; repeals by implication are not favored; *expressio unius est exclusio alterius*.

OPINION OF THE COURT BY FREAR, C.J.

This is an application for a writ of prohibition to restrain further proceedings in a matter instituted by the respondent J. S. Low, as next friend of Annie T. K. Parker, a minor, before the respondent the second judge of the circuit court of the first circuit, at chambers, for the removal of the petitioner as guardian of the property of the said Annie T. K. Parker. That matter was brought and is pending before the circuit judge at chambers under the provisions of Sections 37 and 38 of Chapter 57 of the Laws of 1892, commonly known as the Judiciary Act (C. L., Sections 1145, 1146), as amended by Sections 11 and 12 of Act 32 of the Laws of 1903; and also Sections 1343-1395 of the Civil Code of 1859, (Civil Laws, Ch. 126), as amended by Act 16 of the Laws of 1903,—these being the principal provisions that purport, among other things, to confer and to some extent define the jurisdiction of circuit judges at chambers in guardianship matters. The contention is that these provisions are void as being in conflict with Section 81 of the Organic Act, which reads as follows:

“Sec. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided.”

It is argued that this section vests all the judicial power of

the Territory in certain courts and that therefore none can be vested by Hawaiian laws, whether old or new, in circuit judges at chambers; that the powers of a judge at chambers are limited to matters incidental or ancillary to causes pending in court and do not extend to the hearing and determination of matters of a judicial nature that are independent of any cause pending in court. A number of cases are cited in support of this view, particularly *Ballard v. Carr*, 48 Cal. 70; *Risser v. Hoyt*, 53 Mich. 185; *Toledo A. A. & G. T. Ry. v. Dunlap*, 47 Mich. 456; *Rowe v. Rowe*, 28 Mich. 353; *P. Ft. W. & C. K. W. Co. v. Hurd*, 17 Oh. St. 144; *State v. Woodson*, 161 Mo. 444; *McKnight v. James*, 155 U. S. 685. These cases differ to a greater or less extent from the present case in the language of the constitutional and statutory provisions involved and the circumstances under which those provisions were adopted as well as under which those cases arose, and there are other cases that tend the other way; and yet the cases cited contain reasoning of great force in support of the petitioner's contention.

The present case, however, can not be decided solely as if there were a definite constitutional or organic provision intended to control the organization of a judicial system in the future where none existed previously, or to be chiefly declarative of a different system previously existing, or to introduce radical changes in a previously existing system. No doubt the Organic Act may be regarded as in the nature of a constitution from the standpoint of the Territory, and Hawaiian laws relating to the judiciary, whether previously existing or subsequently enacted, cannot stand if in conflict with the provisions of that act (see 23 Op's. Att'y. Gen'l. 539); and the circuit courts mentioned in Section 81 of that act may, perhaps, be regarded, from the territorial standpoint, as constitutional courts. See *Hind v. Wilder's S. Co.*, 14 Haw. 222; *Ex parte Smith*, 14 Haw. 269. Yet even a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences of a proposed construc-

tion,—with a view to ascertaining the intention of its framers. This rule is especially applicable in the case of an act which, as in the case of the Organic Act now in question (a legislative act from the standpoint of the body that enacted it), contains many different provisions bearing upon the same subjects; which was enacted with reference to a highly developed system of government already existing; and which manifests upon its face from beginning to end an intention to continue that system except as changed in certain respects by that act. See particularly Sections 1, 6-10, 64, 68, 71-79, 81, 83, 91. Many other sections which do not on their face show a general intent to continue the Hawaiian laws in force were themselves taken in whole or in part from the Hawaiian Constitution of 1894, as, for examples, Sections 11-54, 57-62, 80, 82, 84, 99. A striking illustration of the application of these rules of construction is found in the case of *Hawaii v. Mankichi*, 190 U. S. 197, in which the literal meaning of a provision of the Joint Resolution of annexation, which in a sense was the constitution of Hawaii for about two years, was held to be controlled by the general intent shown by the resolution as a whole, by the circumstances under which it was adopted, the past history of Hawaii and her judicial system, and the disastrous consequences that would result from a narrower construction. It is also a general rule of construction that when one state borrows a law from another state it also borrows the construction previously put upon it by the first state. Congress in the Organic Act not only adopted in general terms the laws of Hawaii, including those relative to the judiciary department, with certain exceptions (see 23 Op's. Att'y Gen'l, 539), but it borrowed the provisions of the Organic Act itself relative to the fundamentals of the judiciary mainly from the Hawaiian Constitution of 1894, which were also in the Hawaiian Constitutions of 1852, 1864 and 1887. Compare Sections 81, 82 and 84 of the Organic Act with Articles 82, 83 and 89 of the Constitution of 1894. The division of jurisdiction between courts and judges at chambers, so-called, has

existed, without its validity being questioned, under all of these constitutions.

This is a question of construction. It is not inherently impossible to confer independent jurisdiction of cases not requiring trial by jury upon judges at chambers. That may be done by constitutional provision or by statute in the absence of constitutional restriction. See *Wilcox v. Wilcox*, 14 N. Y. 577; *Brewster v. Hartley*, 37 Cal. 15; *Stewart v. Daggy*, 13 Neb. 290. Nor would it seem inappropriate where, as in Hawaii, the jurisdiction so conferred has as a rule been of an equitable as distinguished from a legal nature—such as was formerly exercised in England by the equity, ecclesiastical and admiralty courts—and has been exercised with the formality and publicity usually obtaining in courts of law. The words “at chambers,” indeed, may be used, and have been used here, in various senses. They may mean the judge’s lodgings or private rooms or they may mean a room set apart, like an ordinary court room, for hearing matters without a jury. See *Com. v. McLaughlin*, 122 Mass. 449. Likewise, proceedings at chambers may imply a certain degree of informality; they may be more or less summary and before a judge acting privately without a clerk; or, they may be formal, instituted by petition and process, with service of summons as in cases before courts of law, and heard in a public court room by the judge with clerk, bailiff, and all the elements that are usually supposed to make up a court of record. Even the word “court” is subject to more or less confusion. It is sometimes used to denote all that makes up the court, and sometimes to denote merely the presiding judge of the court. Again, in order to be a court, a body need not have a particular name. It may be designated a “circuit court” or it may simply be called a court with jurisdiction to hear and determine certain classes of cases. “District courts” and “district magistrates” are used interchangeably in our statutes to denote the same court. It is a court, though not of record. Commissioners of private ways and water rights under our statutes hold courts without names. A court is a political being. It is incorporeal. It may

be described or designated in various ways—even without the use of the word “court” at all.

The words “court” and “chambers” have been used in various senses in Hawaii for more than half a century, but with recognized meanings, whether in statutes or judicial decisions, according to the circumstances. Powers at chambers of the incidental or ancillary sort have been conferred, but the words “at chambers” and other words deemed equivalent have also been used to signify certain distinctions in independent matters. The superior courts of record have borne different names from time to time, but superior jurisdiction has always been divided between the courts under their respective names and the judges of such courts at chambers. This has been a convenient way of indicating certain distinctions. The distinction is in general that between law and equity. The court, under its proper name, as, for instance, the “circuit court,” sits at regular terms, with a jury, in law cases, which go to a higher court by bill of exceptions. The “circuit judge at chambers,” or the “circuit judge,” the “judge of a court of record at chambers,” the “circuit court at chambers,” the “probate court,” the “probate judge at chambers,” etc., as he is variously called, sits continuously, without a jury, in equity and probate, and formerly in admiralty and bankruptcy cases, which go to a higher court by general appeal. There is a court, without a proper name, of the circuit judge. It has often been referred to in both the statutes and judicial decisions as the court of equity or the court of probate, etc. Moreover, it is a court of record, with clerk, bailiff, etc. It usually sits in the public court room of the circuit court. It sometimes sits in the judge’s room or chambers adjoining, as a matter of convenience. The court also, as distinguished from the judge or the judge at chambers, has sat in the judge’s chambers in matters not requiring a jury, or jury waived, or even with a jury, as a matter of convenience or necessity, though naturally not often, at least with a jury, for it is not convenient to have a jury in chambers. For the last twelve years cases could be brought to this court by writ of error as well as by appeal

from circuit judges at chambers just as they may be brought by writ of error as well as by exceptions from circuit courts, and that is still the case.

The jurisdiction and procedure of the courts and the judges at chambers is not all defined by statute. Much of it is covered by statute only in a very general way. For instance, judges at chambers are given jurisdiction in equity in general terms—which means that they have such equitable jurisdiction as has been exercised in chancery in England and the equity courts in America. Even the act of 1878, which enumerates many subjects of equity jurisdiction, is not exclusive, although it was taken from the Massachusetts statute, which is there held exclusive. See *Dole v. Gear*, 14 Haw. 560. Similarly as to guardianship matters. See *Hoare v. Allen*, 13 Haw. 262. Much, as to jurisdiction and procedure, is governed by what may be considered Hawaiian common law,—that has grown up without the aid of statute or has been built upon statutes by inference and been recognized by bench and bar and has to some extent been assumed in the enactment of statutes. In fact, the judiciary has developed here, especially in its earlier period, much as it did in early English history, gradually, and largely without the aid of statute. There was a gradual separation of judicial from executive and legislative functions, a gradual organization of a judicial system, introduction of trial by jury, separation of law and equity, separation of civil and criminal matters at law, and of equity, probate and admiralty matters at chambers, and of the functions of the judge and the jury, and a gradual development in forms of pleading and practice. This began long before the first constitution, that of 1840, the provisions of which were somewhat crude and meager and but little suggestive of the system, especially so far as the superior courts of record—the governors' courts—were concerned, that then existed and rapidly developed for some years afterwards. Prior to the Constitution of 1840, there were scarcely any statutory provisions relative to the judiciary. After that until the act of 1847, organizing the judiciary, there was little more than the act of

1842 (Blue Book, p. 170), which related chiefly to juries and began: "There are two distinct kinds of courts. One kind where the judges or tax officers decide the case by themselves, and the other kind where they can not act by themselves, but certain other persons must be associated with them. These persons who are associated with them shall constitute the jury." The first comprehensive act covering the judicial system with any degree of completeness was that of 1847. That is largely the basis, directly or indirectly, of all subsequent comprehensive acts relative to the judiciary. It divided jurisdiction between certain named courts and judges at chambers. Then came the Constitution of 1852, which has been the basis of all subsequent constitutions. It provided in Article 81: "The Judicial Power of the Kingdom shall be vested in one Supreme Court, and in such inferior courts as the Legislature may from time to time establish." This was followed the next year by the second comprehensive judiciary act, drafted, we believe, by the same person who drafted the constitution, Chief Justice Lee. The main object of this act was to conform the laws to the change in the supreme court. The former supreme court, consisting of the king, premier and four chiefs, whose functions had practically ceased, was dropped altogether, and what had previously been the superior court of law and equity in name, but had already become practically the supreme court as well in reality, was made such in name also. This act also preserves the distinction between the courts and the judges at chambers, in matters of jurisdiction, procedure, methods of appeal, etc. Next came the Civil Code of 1859, embodying, in sections 815-1282, a codification of the laws relating to the judiciary, namely, the acts of 1847 and 1852, and a number of subsequent acts of minor importance, but preserving the distinction between the courts and the judges at chambers in language for the most part still in force in the statute books. The Constitution of 1864 followed, copying for the most part the provisions of that of 1852, including the provision now in question, which was Article 64 of that constitution. The Constitution of 1887 was copied mostly from that

of 1864, and contains the same Article 64. Meanwhile a number of more or less important acts were passed more fully defining or altering in detail the jurisdiction and procedure, that already for the most part existed, in regard to particular subjects. These are set forth in the compilations of 1884 and 1897, which were not enacted. The judiciary act of 1892 made some important changes in the organization of the judiciary and the jurisdiction of the courts but preserved the same distinction between the courts and the judges at chambers. The Constitution of 1894 copied the provisions of that of 1864 relating to the judiciary with some changes not material to the questions now under consideration. The provision now particularly in question appears as Article 82. In view of the fact that constitution after constitution and statute after statute has been adopted by constitutional convention and legislatures and accepted without question by bench and bar and the public throughout the sixty-four years of organized constitutional government in Hawaii, recognizing the constitutionality and propriety of provisions such as those now called in question, coupled with the fact that the "judges at chambers" in the exercise of jurisdiction in equity and probate matters are and have been regarded as courts, and not only that, but courts of record, it would be preposterous to hold that the statutes conferring or defining such jurisdiction of judges at chambers would be void under Hawaiian constitutions or immediately prior to the enactment of the Organic Act.

Under the constitutions of Hawaii, the courts of the circuit judges at chambers as well as the circuit courts, have been established by the legislatures as inferior courts, that is, inferior to the supreme court, in the exercise of the power to establish such courts under the constitutional provision in question. What the relation between a circuit court and the court of a circuit judge at chambers is, is an interesting question that was much argued in this case but need not be decided. In some jurisdictions law and equity are administered by distinct courts as well as by distinct forms of procedure; in others by the same courts though by distinct forms of procedure; in still others by the

same court through the same forms of procedure. Whether the circuit court and the court of the circuit judge at chambers should be regarded as one, that is, whether they should be considered merely as the law and equity sides of the same court, or whether they should be considered as distinct courts, though presided over by the same judges, is a question upon each side of which much can be said. Many statutory provisions as well as many decisions may be regarded as pointing in each direction and yet are not necessarily inconsistent with either theory. Among the cases see *Kendall v. Holloway*, 16 Haw. 45; *Kala v. Mills*, 15 Haw. 422; *Hind v. Wilder's S. Co.*, 14 Haw. 215, 223; *Silva v. Souza*, 14 Haw. 46; *Willard v. Vincent*, 13 Haw. 237; *Kona Coffee Co. v. Circuit Court*, 10 Haw. 571; *Est. of Metcalf*, 3 Haw. 614. A discussion of the numerous statutes and decisions would be too lengthy. Whether the court of the judge at chambers is the same as the circuit court or a different court, it is a court, and it is a court of record, and it and its predecessors have existed unquestioned for more than fifty years.

The question is not merely whether Congress intended by Section 81 of the Organic Act to prohibit the creation of such a court in the future but whether it intended to abrogate such courts already existing. That section is borrowed with modifications from the provision above quoted found in the last four Hawaiian constitutions, under which such courts must be held, under the rule of long continued and unquestioned as well as contemporary construction, not to mention other rules, to have been legally constituted. If no modifications had been made in this borrowed section, could we hesitate to hold that Congress did not intend that it should mean something so radically different from what it has been construed for half a century to mean, or that Congress did not intend by adopting the same provision to repeal by implication what had become so thoroughly established under it? Do the modifications require a different construction? The only modification in the main provision of this section consists in the insertion of the words "circuit courts." It is contended that this modification in itself shows an intention to introduce

a change in the judicial system of Hawaii. That is not a necessary inference. If we could with propriety look to the reports in the Congressional Record of the reasons given for inserting these words by way of amendment on the floor of Congress, we should find it to be an erroneous inference. The insertion of these words would naturally, in view of the fact that there were already circuit courts here, be considered as preservative rather than destructive. Those words, of course, mean such circuit courts as were already here. Otherwise there would be nothing to indicate what their nature was to be, except that they should be "circuit" courts—which gives no clue to their jurisdiction as respects either subject matter or territory. The continuation of Hawaiian laws relative to the judiciary also shows that the existing circuit courts were meant. Congress did not define the jurisdiction of such courts except by reference to the laws of Hawaii. The apparent object of inserting the words "circuit courts" was to insure a continuance of those courts rather than the abrogation of other courts, and the reason why it was thought best to insert these words for that purpose may have been the possibility of doubt as to whether such courts, being courts of record of general jurisdiction, would be included under the words "inferior courts." Several reasons may easily be imagined as likely to suggest the advisability of inserting these words. In the nature of things there might be courts of circuit judges at chambers consistently with the presence of the words "circuit courts" in this provision, as well as there could be courts of judges at chambers under the original provision in the Hawaiian constitution, when there were courts of the justices of the supreme court at chambers, during the period when they had original as well as appellate jurisdiction, notwithstanding the words "*supreme court*" in the constitutional provision, or when there were courts of circuit judges at chambers notwithstanding the words "*inferior courts.*" Indeed, if we must infer an intention to make radical changes by the introduction of these words, we may as well infer that Congress meant "circuit" courts strictly speaking, that is, courts that travel about the cir-

cuit, and so to abrogate the existing circuit courts which had become fixed although they retained the name that they had years ago when they did travel.

But it is contended that the remainder of the section shows that a change was intended. This, to repeat it, reads as follows: "And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." The argument is that "herein" refers to this section and not to the entire act, and that, since the insertion of the words "circuit courts" is the only change made, the phrase "*except as herein otherwise provided*" must show that a change was intended in the classes of courts. It is clear, however, that "herein" refers to the entire act, and therefore, since a number of changes in the judiciary are made by other sections (e. g., Secs. 7, 83, 86), the phrase in question is fully explained by reference to them. "Herein" may refer to the act as well as to the section. It must be held to refer to the act or else this section would be in conflict with the other sections that make changes in the laws relative to the judiciary. Moreover, the same phrase "except as herein otherwise provided" is found in other sections where it must refer to the whole act. See Secs. 5, 12, 35, 48.

The latter portion of Section 81, indeed, far from showing an intention to repeal, shows a general intention to continue in force the laws "heretofore in force concerning the several courts and their jurisdiction and procedure." But it is suggested that the laws conferring jurisdiction on judges at chambers were void under the Hawaiian constitutions also, and so were not "heretofore in force." This argument has already been practically disposed of. It is further argued that even if the old laws were continued in force, this would not affect the argument that the new laws, namely, the amendments of 1903, above referred to, were void. But (aside from the more reasonable view that future amendments might well be made as to details along lines consistent in principle with the old laws, and the fact that the

amendments in question did not affect the old laws materially so far as the questions now before us are concerned), even if the new laws were void, the old laws would remain in force and they cover the ground. It is contended, however, on the other hand, that the old laws were to continue only "until the legislature shall otherwise provide," and that, since the legislature has otherwise provided, namely, in the amendments referred to, the old laws have ceased to be operative. But, as we have seen, the legislature has not otherwise provided except in certain particulars—which do not go to the extent of materially affecting the general jurisdiction of circuit judges in guardianship matters. Moreover, if the new laws are valid, they are sufficient in themselves without the old laws; while, if they are invalid, the legislature has not otherwise provided and the old laws remain and are sufficient in themselves.

Thus, not only is there nothing in Section 81 that requires us to hold that Congress intended, by the insertion of the words "circuit courts," to effect the important change contended for—a change by mere vague implication that would abrogate in toto the courts having equity and probate jurisdiction, but there is much in this section to indicate the contrary. This different intention is strongly sustained by other sections of the act. Section 83, for instance, shows a general intent in this direction by providing "that the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, are continued in force," etc., and then making certain specific changes, but not in respect to the jurisdiction or powers of judges at chambers. Section 7 expressly repeals many laws relating to the judiciary, such as that conferring upon circuit judges jurisdiction in bankruptcy. It even expressly repeals the "first subdivision of section eleven hundred and forty-five," (relating to admiralty jurisdiction) of the Civil Laws,—the section that is now in question and that defines in twelve subdivisions the jurisdiction of circuit judges at chambers, but does not mention the subdivisions that confer upon such judges equity and probate jurisdiction. *Expressio unius est exclusio alterius. Expressum facit cessare tacitum.*

Section 10, entitled "Construction of existing statutes," provides "that all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed; * * * all actions at law, *suits in equity, and other proceedings* then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the *corresponding courts* of the Territory of Hawaii." This permitted the retention by circuit judges at chambers of admiralty cases then pending, although all admiralty jurisdiction over new cases was transferred from them to the United States district court for Hawaii. *Ex p. Wilder's S. Co.*, 183 U. S. 545; *Wilder's S. Co. v. Hind*, 108 Fed. 113; *Hind v. Wilder's S. Co.*, 13 Haw. 174. It equally authorized the retention by circuit judges at chambers of jurisdiction in equity and probate matters then pending. Some such matters, especially in probate, might not be finally disposed of for several years, during all of which time the circuit judges at chambers would continue to exercise such jurisdiction. This, it is true, is in the nature of an interregnum clause. But it provides for the continuation of such suits and proceedings in the *corresponding* courts of the Territory, thus implying that there were to be such corresponding courts. It was a temporary provision for pending cases, not temporary for existing courts; it provided for the completion of all pending cases, whether of kinds the jurisdiction over which was to remain or be taken away,—but in the corresponding courts, which were to continue for new as well as for pending cases. It was not contemplated that such cases should be transferred from circuit judges at chambers to circuit courts; nor is there any indication of an intention to continue the courts of the circuit judges at chambers temporarily only.

The permanent writ is denied and the temporary writ dissolved.

Ballou & Marx; Kinney, McClanahan & Cooper; and Robertson & Wilder for petitioner.

J. A. Magoon and J. Lightfoot for respondent.

GONSALVES & COMPANY, LIMITED, PLAINTIFF, *v.*
JACOB WATSON, DEFENDANT, HAWAIIAN
ELECTRIC COMPANY, LIMITED, GARNISHEE.

APPEAL FROM DISTRICT COURT, HONOLULU.

SUBMITTED NOVEMBER 9, 1904. DECIDED NOVEMBER 14, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

PRACTICE—evidence—plea of general denial in an action by a corporation.

In an action before a district magistrate by a corporation evidence that the plaintiff was indebted in the sum claimed to "Gonsalves & Company, Ltd.," is evidence that the plaintiff firm is incorporated; but in a plea of general denial in such an action it is unnecessary to prove the corporate capacity of the plaintiff.

OPINION OF THE COURT BY HARTWELL, J.

The defendant pleaded a general denial in the action by the plaintiff corporation for the price of goods sold and delivered. He offered no evidence but moved "to dismiss the case on the ground that there is no proof that the firm of Gonsalves & Company, Ltd., is a corporation."

The magistrate gave judgment for the plaintiff for \$46.00 and costs. The defendant appealed on the point of law covered by his motion. He relies on the general rule of law that the evidence must prove the allegations alleged in the complaint. The plaintiff claims that while the plea of the general denial made proof of its corporate capacity unnecessary, the capacity was sufficiently proved by the evidence given by a witness that the defendant was "indebted to the firm of Gonsalves & Company, Ltd., in the sum of forty-six dollars."

The use of the word "limited" naturally imports a corporation, and renders further proof unnecessary. A plea of general denial, however, has generally been regarded as equivalent to a plea of the general issue, which "admits the competency of the plaintiff to sue as such." *Pullman v. Upton*, 96 U. S. 328.

This court has decided that in a complaint before a district magistrate in an action by a corporation it is unnecessary to allege that the plaintiff is a corporation. *Hawaii Mill Co. v. Andrade*, 14 Haw. 500.

The appeal is dismissed.

H. G. Middleditch for plaintiff.

W. C. Achi for defendant.

WILLIAM W. BIERCE, LIMITED, A CORPORATION,
PLAINTIFF IN ERROR, v. R. W. McCHESNEY and
J. M. McCHESNEY, SURVIVING PARTNERS IN
THE CO-PARTNERSHIP OF R. W. McCHESNEY,
J. M. McCHESNEY AND F. W. McCHESNEY, A
CO-PARTNERSHIP CARRYING ON BUSINESS
UNDER THE FIRM NAME AND STYLE OF M. W.
McCHESNEY & SONS, THE KONA SUGAR COM-
PANY, LIMITED, A CORPORATION, F. L.
DORTCH, RECEIVER OF THE KONA SUGAR
COMPANY, LIMITED, THE FIRST AMERICAN
SAVINGS & TRUST COMPANY OF HAWAII, LIM-
ITED, A CORPORATION, KAPIOLANI ESTATE,
LIMITED, A CORPORATION, L. M. WHITEHOUSE,
J. D. PARIS, HANNAH J. PARIS, ELIZA ROY,
W. H. SHIPMAN, J. D. JOHNSON, W. H. JOHNSON
AND CAROLINE J. ROBINSON, DEFENDANTS IN
ERROR.

ERROR TO CIRCUIT COURT, THIRD CIRCUIT.

ARGUED NOVEMBER 7, 1904. DECIDED NOVEMBER 21, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

WRIT OF ERROR TO ORDER OF SALE BY RECEIVER—*non-joinder of purchaser.*

A writ of error lies to an order of sale by a receiver and does
not require that the purchaser be made a party.

APPEAL FROM ORDER CONFIRMING RECEIVER'S SALE—*questions open on such appeal.*

Only questions of jurisdiction and matters subsequent to the order of sale are considered on an appeal from an order confirming a receiver's sale.

ORDER FOR SALE BY RECEIVER—*failing to except property claimed by a receiver.*

There is no error in an order of sale failing to except property in receiver's hands claimed by the plaintiff in error in an intervener's suit.

OPINION OF THE COURT BY HARTWELL, J.

This is a writ of error to an order of sale by a receiver of all the estate and property of the Kona Sugar Company, Limited, made by the judge of the third circuit in a suit pending before him. The plaintiff in error was an intervener in the suit, claiming certain steel rails, locomotives and other railroad property in the possession of the receiver, and assigns as error that the order of sale did not except the property so claimed. The defendants in error moved to quash the writ on the grounds that the plaintiff in error had appealed said cause to this court, and that all matters in controversy in said cause had been finally determined by this court and are now *res judicata*; that the writ of error is defective in not making one Hutchins, the purchaser at the receiver's sale, a party; and further, that no writ of error lies from the order of sale.

No argument on these last two grounds was presented, the contention of the defendants in error being confined to the ground that the plaintiff in error is estopped from presenting any objections to the order of sale which might have been presented in its appeal. The second and third grounds of the motion cannot be sustained. The plaintiff in error claims that as the appeal was taken from the order confirming the sale, it could not have presented objections to the order of sale other than that of jurisdiction, which was the only question decided in the appeal, as reported in 15 Haw. 710. We think this is the correct view. The only matters which the court could have

examined besides that of jurisdiction would be those which were subsequent to the order of sale. *Turner v. Farmers' Loan & Trust Co.*, 106 U. S. 552; *Allen v. Shepard*, 87 Ill. 314; *Bank v. Scofield*, 9 Neb. 499.

The motion to quash is therefore denied.

But we are unable to see error in the order of sale, which does not purport to authorize a sale of any property of the plaintiff in error, but only that of the Kona Sugar Company. There is no evidence before us of any title of the plaintiff in error in any of the property ordered to be sold. The mere fact that the plaintiff in another suit claimed some of the property in the hands of the receiver does not authorize this court to declare the order of sale to be erroneous.

The writ of error is dismissed.

Kinney, McClanahan & Cooper and *C. A. Galbraith* for plaintiff in error.

Cathcart & Milverton for defendants in error.

SAMUEL ANDREWS *v.* WAHINENUI.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 14, 1904. DECIDED NOVEMBER 21, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

EJECTMENT—*conveyance of the land by the plaintiff after commencement of action.*

The plaintiff's case showed that he had conveyed the land to a third person after the action was entered. The court ordered a nonsuit on that ground. Ruling sustained.

OPINION OF THE COURT BY HARTWELL, J.

This was an action of ejectment in which the plaintiff was nonsuited on the ground that "the evidence of the plaintiff disclosed that since the commencement of the action the plaintiff had parted with his title to the land in dispute by deed to one L. L. McCandless." The propriety of the nonsuit is the only question presented by the bill of exceptions. Cases are cited in the plaintiff's brief from the California, Kentucky, Ohio, Alabama, Vermont, Illinois, Massachusetts, Maine, Michigan and North Carolina courts. Two Federal cases are also cited, one of which (68 U. S. 371), was a California case and the other (69 Fed. 579), was in North Dakota, each of the cases being decided according to the law of those states. The citations are made in order to show that it "has been held that a conveyance of the land in controversy by the plaintiff pending an ejectment does not affect his right to recover." 10 Ency. Law, 494.

An examination of the cases cited is far from sustaining the position of the plaintiff. Some of them are based on a statutory provision that the termination of the plaintiff's title pending the trial shall not preclude him from recovering judgment. Such appears to be the law in California and Illinois. Others are an application of the rule that the tenant cannot dispute his landlord's title. Such are the Massachusetts cases cited. Others again, like the Michigan and Maine citations, are based on a rule of practice requiring a special plea *puis darrein continuance* that the plaintiff has parted with his title, and they recognize that the plea is a good defense; for instance, in *Leavitt v. School Dist.*, 78 Me. 578, the court say: "Why should the plaintiff recover the possession of land after his right to the possession is extinguished and it is certain that he cannot hold it if it is given to him." Alabama courts held that the defense is not good under the rule that a disseizee cannot convey a title. The rule was carefully considered in *Mossman v. The Government*, 10 Haw. 432, in which the court took the view that "if this ever were the common law it is now obsolete as such and has

no existence at the present time apart from statute." In *Arrington v. Arrington*, 114 N. C. 120, the court held that "in an action to recover land the rule is that the plaintiff must have the right to the possession not only at the institution of the suit but at the time of trial also. This is said by Lawson (*Rights & R.*, Vol. VII, Sec. 3708) to be almost the universal rule, the only exception thereto being in Vermont, as he says in his note referring to *Edgerton v. Clark*, 20 Vt. 264. That case does not sustain the statement of the learned author that it is an exception to the rule. It only decides that a plaintiff in such an action, who has title to the demanded premises at the commencement of his suit, and at the *time of trial*, is not precluded from recovering by the fact that there has been an intervening period during which he has by his own acts been divested of all title."

The law as "laid down" in the passage quoted from the Encyclopedia is not sustained by the authorities cited. The nonsuit was properly ordered and the exceptions are overruled.

Castle & Withington for plaintiff.

No appearance for defendant.

ARTHUR M. BROWN, HIGH SHERIFF OF THE TERRITORY OF HAWAII, PLAINTIFF IN ERROR, *v.*
GOTO, DEFENDANT IN ERROR.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JULY 11, 1904.

DECIDED NOVEMBER 28, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

HABEAS CORPUS—*jurisdiction to issue writs of.*

Circuit courts have not jurisdiction to issue writs of *habeas corpus* in cases in which such writs are not demandable of right. Such jurisdiction is confined by the statutes to the supreme court, its justices and the circuit judges. The jurisdiction to issue such writs is not inherent in the circuit courts in the sense that the legislature cannot vest it in other courts or in the judges, to the exclusion of the circuit courts as such, nor does the Organic Act (Sec. 81) deprive the legislature of such power.

OPINION OF THE COURT BY FREAR, C.J.

The defendant in error was tried, convicted, and sentenced to pay a fine of \$500 and costs, in the district court of Honolulu on a charge by information or complaint of selling spirituous liquors without a license in violation of Section 444 of the Penal Laws. He appealed to the circuit court, pleaded guilty, and was sentenced to pay a fine of \$350 and \$3.50 costs, the maximum penalty allowed by the statute being a fine of \$500—for a first offense. Failing to pay the fine and costs he was committed to prison at hard labor under Section 577 of the Penal Laws until the fine and costs should be paid, subject to release as provided in the same section at the expiration of a

year in case of inability to pay the fine and costs, the imprisonment in any event to discharge the fine and costs at the rate of fifty cents a day under Section 583 of the Penal Laws. Afterwards the circuit court, a different judge presiding, released him on habeas corpus from such imprisonment, which was at Oahu Prison, on the ground that imprisonment at hard labor at such prison was an infamous punishment and that the prisoner had not been indicted as required by the Fifth Amendment of the Federal Constitution in cases of infamous offenses. This writ of error was then brought to reverse the judgment discharging the prisoner—the plaintiff in error contending (1) that the circuit court was without jurisdiction to issue writs of *habeas corpus* and (2) that the offense was not infamous and so could be tried on information or complaint. No opinion need be expressed upon the second of these contentions as we are of the opinion that the first must be sustained.

Under the Civil Code of 1859, Secs. 855, 880, 883, the justices of the supreme court, the circuit courts and the circuit judges had original jurisdiction to issue writs of *habeas corpus*. Under the *habeas corpus* act of 1870, Chapter 32, Section 32 (part of which is Civ. Laws, Section 1676), it was provided that the power to issue the writ in cases in which, as in the present case, it is not demandable of right “shall only be exercised by the justices of the supreme court.” Under the judiciary act of 1892, Chapter 57, Sections 37, 51, (Civ. Laws, Secs. 1145, 1164), each justice of the supreme court had original jurisdiction to issue the writ and make it returnable before himself, the supreme court, any circuit court or any circuit judge, and circuit judges had jurisdiction “to issue writs of *habeas corpus* according to law,” and Sections 855, 880, 883, of the Civil Code were repealed. In *Re Matsuji*, 9 Haw. 402, it was held that the judiciary act did not authorize circuit judges to issue the writ in cases in which it was not demandable of right. Act 75 of the Provisional Government repealed the clause in the act of 1870 confining to the justices of the supreme court the power to issue the writ in cases in which it was not demand-

able of right, and (Civil Laws, Sec. 1677) authorized circuit courts and circuit judges to issue the writ in cases in which it was not demandable of right as well as in cases in which it was demandable of right. Act 79 of the Laws of 1903 repealed Act 75 of the Provisional Government and amended the Act of 1870 so as to permit the supreme court, the justices thereof and the circuit judges to issue the writ in both classes of cases. Thus, it is clear that under the Act of 1870 the circuit courts could not issue the writ in cases of this kind, and under the judiciary act they probably could not issue it in any case, and the only act, that of the Provisional Government, which has since given them the power has been repealed. So far as the statutes go, therefore, a circuit court cannot issue a writ of *habeas corpus* in a case in which it is not demandable of right and probably not in any case.

It is contended, however, for the prisoner that the writ is a high prerogative writ guaranteed by the Constitution and that a circuit court, being a court of general original jurisdiction, has inherent power to issue it and that this cannot be taken away by the legislature. It may be conceded that this is a common law writ and that courts of general original jurisdiction have power to issue it in the absence of constitutional or statutory provision to the contrary, but that it is a power inherent in any particular court in the sense that the legislature cannot, in the absence of constitutional restriction, take it away from that court and vest it in other courts, or prescribe whether it shall be exercised by the court or the judge, in term time or vacation or at chambers, does not seem to be supported by the authorities. The courts and judges and the mode of exercising the power are generally matters of statutory regulation. 9 Enc. Pl. & Pr. 1013; 15 Am. & Eng. Enc. of Law (2nd Ed.) 145. Undoubtedly the right to the writ could not be taken away by statute but that is quite a different matter from prescribing by what courts, in what manner and under what conditions, within reasonable limits, it may be exercised. The only provision in the Constitution relating to the writ is that

"the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. 1, Sec. 9. The Organic Act contains a somewhat similar provision. Sec. 67.

It is further contended that since the circuit courts had this jurisdiction when the Organic Act took effect, and since that Act (in Sec. 81) continued the circuit courts, those courts must have been continued as they were then, that is, with this jurisdiction, and that therefore the Territorial legislature cannot change them by taking away this jurisdiction. What the full effect of the insertion of the words "circuit courts" in this section is, we need not undertake to say. See *Re Carter*, ante, p. 242. Nor is it necessary to express an opinion as to the extent of the legislative power of the Territory in regard to the composition, jurisdiction and procedure of the circuit courts. See 23 Ops. Atty. Genl. 539. But that the legislature may go so far as to confine the original jurisdiction in *habeas corpus* cases to the supreme court, its justices and the circuit judges, to the exclusion of the circuit courts as such, we believe is shown by the Organic Act itself, for it provides in this same section that "*until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided,*" and in Section 83, "that the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, *subject to modification by Congress, or the legislature.*" See also Secs. 6, 55.

The circuit court being without jurisdiction to issue the writ of *habeas corpus* in a case of this kind, its judgment is reversed.

E. C. Peters, Deputy Attorney General, for plaintiff in error.
Cathcart & Milverton for defendant in error.

TERRITORY OF HAWAII v. MATSUMOTO MORITARO.

EXCEPTIONS FROM CIRCUIT COURT, FIFTH CIRCUIT.

ARGUED NOVEMBER 9, 1904. DECIDED NOVEMBER 28, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

CONFESSION.

A confession by a person accused of murder made in the presence of the sheriff, his deputy, a detective, and an interpreter not in the employ of the prosecution held admissible in evidence, notwithstanding the fact that the sheriff charged the defendant to tell the truth, and did this because other witnesses had implicated defendant.

ID.

A slight assault by a detective upon defendant during an interview at which the detective sought to obtain a confession from defendant, but failed to do so, held not to affect the admissibility in evidence of a confession made two days subsequently.

OPINION OF THE COURT BY HATCH, J.

The defendant Matsumoto Moritaro was indicted by the grand jury of the fifth circuit on the 25th day of March, 1904, for the murder of one Albion H. Glennan. The defendant was tried at the March term, 1904, of the circuit court of the fifth circuit, was found guilty of murder in the first degree and was sentenced to death. The murder was one of extreme atrocity. The defendant had been employed as a laborer upon a ditch being constructed on the island of Kauai, and was discharged by the deceased at the instance of the engineer in charge of the work for neglecting his duty. The defendant claimed that he was assaulted by the deceased and discharged without being paid the

amount due him. The deceased was an overseer in charge of the work, which consisted largely of tunneling and the use of dynamite. The murder was committed by exploding seven or eight sticks of giant powder under the bed of the deceased, who slept in a tent near the scene of the work. The telephone wire leading from this tent to the Makaweli plantation had been cut by the defendant just prior to the murder.

Certain exceptions to the admission of testimony were taken during the course of the trial, none of which have been relied upon in the defendant's brief. The only point presented to us is as to the admissibility of the confession made by the defendant. It is claimed on behalf of the defendant that the confession was made under duress and should not have been received in evidence. The evidence shows that some thirty Japanese were arrested on suspicion, being held on charges of vagrancy and other charges. The defendant was arrested in Honolulu and sent to Kauai. While in jail at Kauai one Chester A. Doyle, a detective, interviewed the defendant on the 5th or 6th day of February, 1904, for the purpose of obtaining a confession from him, if possible. Doyle testified to the court, on a hearing had in the absence of a jury, as to the admissibility of the confession, that he started in to ask the defendant everything he could possibly think of leading up to the time he came to the islands and as to his connection with the plantations. Doyle says that the "defendant told so many conflicting stories and lied so that when we called his attention to his conflicting statements and asked him if he wasn't lying he would remain silent. Every time I questioned him he would tell another story and he would get tripped up, and eventually he got very insulting and used language that you or I would not take from anybody, and I shook him and boxed his ears."

"COURT. More than once?

A. I think more than once.

Q. So as to inflict any bodily injury?

A. There were no marks on him, I struck him with my open hand over his ears.

Q. You struck him in consequence of his using insulting language to you?

A. Yes, sir.

Q. After you had shook him and boxed his ears, as you say, did you have any further conversation with him?

A. None; we left him."

On the morning of the 8th of February the preliminary examination was had before the district magistrate, and the defendant was committed to await the action of the grand jury. At the close of the examination one Kawahara, who had been called as a witness for the prosecution, asked permission to have an interview with the defendant. Kawahara was the person at whose house the defendant took refuge on the morning of the 9th of January, after committing the murder. Kawahara had testified that the defendant when he came to his house had told him all the details of the murder. After this conversation with Kawahara at the court house the defendant admitted that he was the guilty party and expressed a willingness to make a full confession. The defendant was then taken back to the jail, and in the afternoon of the same day was again brought to the court house, there being present the sheriff, Mr. Coney, the deputy sheriff, Mr. Rice, Mr. Doyle, Mr. Prosser and Mr. Sheba. The latter acted as interpreter. He was the Japanese editor of the "*Garden Island*," and was in no way connected with the prosecution. Mr. Sheba stated that the defendant was warned before making any statement that everything he might say would be used against him, and that he could stand mute and say nothing at all if he chose; that the statement made by the defendant was voluntary, and that no threats or inducements were used to influence the defendant. The defendant then gave a detailed statement of everything connected with the commission of the crime and the statement was reduced to writing in his presence. Mr. Coney, the sheriff, before the statement was made, charged the defendant to tell the truth, using only the words "tell the truth." On cross-examination the sheriff stated that he charged the defendant to tell the truth because other witnesses had impli-

cated him. It is not clear that this fact of the implication by other witnesses was communicated to the defendant by the sheriff. If, however, he had stated this to the defendant, though it was an improper statement to make to him, we do not think that under the circumstances this alone should render the confession inadmissible. In *Bram v. United States*, 168 U. S. 532, the statement to a person under examination that a co-suspect had stated that he had seen him commit the offense was one of a number of circumstances which, taken together, led to the rejection of a confession, but the court stated that when isolated from each other the facts might not have warranted that result. The other facts in the *Bram* case were not at all analogous to the facts in this case. In the *Bram* case the defendant was subjected to great personal indignity and browbeating, to such an extent that the court held that Bram could not be considered a free agent when he made his statement. There is nothing in the present case upon which to base such a conclusion. The trial judge, before admitting the confession in evidence, excused the jury and entered upon a most careful and searching examination of all of the facts connected with the making of the confession. He found as a matter of fact that no promise or threat had been held out to the defendant, nor that any inducement had been shown calculated to cause an untrue admission of guilt to be made. Our statute on the subject is as follows:

"No confession which is tendered in evidence on any trial, shall be rejected on the ground that a promise or threat had been held out to the person confessing, unless the judge or other presiding officer shall be of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made; nor shall any confession which is tendered in evidence on any trial be rejected on the ground that it purports to have been made on oath, if proof can be given to the judge or other presiding officer, that in fact it was not so made." Sec. 1427, C. L.

The court ruled that under the statute the confession was admissible in evidence. This ruling was correct. The confession was deliberate and voluntary, and was taken under circumstances showing a due regard for the rights of the defendant.

We can see no ground for an argument that the defendant was not a free agent at the time he made this statement.

The misconduct of Doyle on the occasion two days previous, when he shook and slapped the defendant, we do not find had any influence in causing the defendant to make the confession. The assault, though inexcusable, was in fact trivial in its nature. The defendant made no admission at the time, and on his examination at the trial even denied that any assault had taken place. It was rather an exhibition of loss of temper on the part of Doyle than an assault with intent to injure the defendant or to influence his action. All of the circumstances show that it made a very slight impression, if any, upon the defendant. He had had time to fully recover from the effect of the indignity before he was brought into court on his preliminary examination before the committing magistrate. Notwithstanding this, the action of Doyle on that occasion calls for severe condemnation. To lay his hands at all on one held under arrest was a cowardly thing to do and a gross violation of the rights of the prisoner. A confession made at that time and under those circumstances could not have been received in evidence, for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of a prisoner, and therefore excludes the declaration if any degree of influence has been exerted. *Bram v. United States, supra*. The whole procedure of police inquisition known as the "sweat box" is a matter which has no warrant of law. It is entirely at variance with the spirit of the common law. As pointed out in *Bram v. United States*, it is condemned by the English courts as unfair to the prisoner and approaching dangerously near to a violation of the rule protecting an accused person from being compelled to testify against himself. Without holding that no interrogation can be put by the police to a person arrested on suspicion, such investigations must be conducted with a due regard for the rights of the accused, and must be free from browbeating, intimidation and undue pressure of any kind.

The exceptions are overruled and the case remanded to the circuit court of the fifth circuit.

M. F. Prosser, Deputy Attorney General, for prosecution.

A. G. Correa for defendant.

DONG CHONG *v.* HONOLULU RAPID TRANSIT &
LAND COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 10, 1904. . DECIDED NOVEMBER 28, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

After having left a team of gentle mules hitched in a narrow place between the sidewalk and car tracks where they had been hitched on previous occasions and from where cars could be seen when several hundred yards away, the plaintiff unhitched the mules and took his seat on the wagon, when he saw defendant's electric car coming about fifty feet away. He tightened the reins and put on the brake. When the car was abreast of the mules, they suddenly shied towards the car, in consequence of which one of them was struck and injured, so that it had to be killed. The car, although on a down grade, was then stopped in about sixty-five feet. Plaintiff and another witness testified that the car was going at an unusually rapid rate. In an action for damages, a nonsuit was ordered. Held,

STREET CAR ACCIDENT—*contributory negligence—proximate cause—rights of public and electric cars on streets.*

It was not as matter of law such contributory negligence as would preclude a recovery, to hitch the mules in a narrow place, or not to look to see if a car was approaching before unhitching or not to delay unhitching until the car had gone by. If such acts or omissions constituted negligence, that would not necessarily

relieve the defendant of responsibility. Plaintiff and defendant had equal rights to the use of the street, and, although defendant had superior rights to some extent in the use of the tracks, its servants were bound to exercise due care to avoid injury to the plaintiff's person or property. Though one places himself or his property in a position of danger, another cannot wilfully or recklessly or carelessly injure him or it, even by doing what ordinarily may rightfully be done. The latter, upon being apprised of the danger, must avoid it if he can reasonably. If he does not, he is liable, his negligence in such case being the proximate, and the other's negligence only the remote cause of the injury.

Id.—negligence—proof—rate of speed.

The burden of proof is on the plaintiff to show negligence on the part of the defendant. It is not sufficient to show that the accident occurred, or to show facts as consistent with care and prudence as with negligence. Nor is negligence shown when the circumstances were such that the car might properly run at a usual or proper speed and was running without unusual sights or sounds, and there was only indefinite testimony that it was running at an "unusual speed" and definite testimony by plaintiff himself that, though on a down grade, it was stopped in about sixty-five feet, that there were no indications that the mules were frightened until the car was abreast of them, that the accident would not have happened but for their sudden shying and that there was no time to avoid a collision after they did shy.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for \$123.75 damages caused to plaintiff's mule, wagon and harness by a collision with one of defendant's electric street cars. The district magistrate, who first tried the case, ordered a nonsuit, and at the trial before a jury on appeal, the circuit judge also, at the close of the plaintiff's evidence, ordered a nonsuit, on the ground that the plaintiff had failed to show negligence on the part of the defendant—the latter's motion for such nonsuit having been made on that ground and the additional ground that the evidence showed contributory negligence on the part of the plaintiff. The question raised by the exceptions is whether error was committed in ordering the nonsuit.

The collision occurred on January 7, 1903, on the upper side of King street about 150 feet south of the junction of King and Beretania streets in Honolulu. The plaintiff had hitched his team of mules and wagon to a telephone pole near the sidewalk facing north, spent a short time making a purchase in a store at that place, returned to the mules, unhitched them, mounted the seat of the wagon and picked up the reins, when he saw the car coming towards him about fifty feet away. He then held the reins tight or pulled them and put on the brake. When the car was abreast of the mules they shied toward the car, which struck and broke one of the hind legs of the near mule, making it necessary to kill the mule, and broke the pole of the wagon, and the harness. The car could have been seen approaching for a distance of several hundred yards. It came on a slight down grade. The motorman sounded the gong shortly before reaching the team (the plaintiff thinks he did not hear it), but did not begin to slow down until the accident occurred and then he stopped the car after running about sixty feet. The distance between the track and the curbing, which was a few inches in height, was nine feet and some inches where the wagon was, and seven or eight feet where the mules' heads were, this narrower distance at the latter point being due, according to the evidence, to the presence of the telephone pole there and perhaps partly to a slight curve or slant in the track or curbing which brought them nearer together. It does not appear how far the running board of the car extended beyond the rails. The box of the wagon was about four feet wide and the width of the wagon at the hubs was a little less than six feet. The mules were gentle, and were standing quietly until the car was opposite them. They had been tied at the same place on previous occasions when cars had gone by. The plaintiff testified that there was room enough for the wagon and attributed the accident to the shying of the mules due to their feeling a dash of wind caused by the car going at a "rapid rate," an "unusual speed," a "very unusual rapid rate." Another witness said that the car was "running in a very rapid rate," at an "unusually rapid speed on this occa-

sion." A third witness said that the car was going at a "rapid rate."

We cannot say as matter of law that the plaintiff was guilty of such contributory negligence as would preclude him from recovering damages, if he had shown negligence on the part of the defendant. He had an equal right with the defendant to the use of the street. His mules were gentle. They had stood there on previous occasions when cars had gone by. There was room enough. The mere fact that he hitched them in a narrow place would not necessarily show negligence on his part. See cases *infra*. Nor would negligence necessarily be shown by his not first looking up the street to see if a car was coming and not delaying to unhitch the mules until after the car had gone by. If he had left his mules unhitched or if he had placed himself in such a position that he could not hold or control them in the usual way, and the motorman was not apprised of any special danger, the case might have been different. *Winter v. Fed. etc., Ry.*, 153 Pa. St. 26; *Gilmore v. Fed. etc., Ry.*, 153 Pa. St. 31. But here he was in his seat with the reins well in hand and the brake down at the time of the accident. As we shall see later on, it would not have been negligent on the part of the motorman to have passed at the usual or at a proper speed if there was room enough and nothing to lead him to anticipate danger from the action of the mules; and his negligence, if any, arose from his going at an unusual rate. Did not, then, the fact that the car was approaching at an unusual speed make it negligent for the plaintiff not to look and discover the fact and refrain from unhitching until the car had passed, even if his action would not have been negligent in case the car was approaching at a usual or proper rate? Not necessarily. He was not obliged to be on the lookout for unusual or improper speed when there was nothing to lead him to expect such speed, and if he had discovered that the car was coming at such speed while it was yet a long way off, he might reasonably expect it to slow down to a usual or proper speed before reaching him, just as a motorman may ordinarily expect a person or team on the track to leave it in time to avoid

a collision; and if the motorman kept a proper lookout and saw in time that the defendant had unhitched, he would have to govern himself accordingly. To continue at an unusual speed then might be negligence that would be the proximate cause of the injury while the negligence, if any, of the plaintiff might be only the remote cause. The most that can reasonably be contended is that the question of contributory negligence was one that under the circumstances could properly be left to the jury. Even if it were negligent to hitch the mules in such a narrow place or to unhitch them before the car had passed, the plaintiff would not necessarily be barred from recovering. He might even have left his team and wagon upon the defendant's tracks or so near to them that the car would certainly strike them if not stopped, and so be guilty of negligence, and yet be able to recover. For, although the defendant's cars may have superior rights to some extent upon its tracks, its motormen cannot wilfully or recklessly or carelessly disregard or endanger the personal or property rights of others. The negligence of the plaintiff may be prior in time and independent and distinct from that of the defendant's servants and only the remote cause of the accident, and that of the defendant's servants may consist in a failure to exercise due care in not discovering the danger or in not avoiding it after discovering it, and be the proximate cause. *Atwood v. Railway Co.*, 91 Me. 399; *Laetham v. Railway Co.*, 100 Mich. 297; *Oddie v. Mendenhall*, 84 Minn. 58; 86 N. W., 881; *Koch v. St. P. City R. Co.*, 45 Minn. 407; *Kestner v. Traction Co.*, 158 Pa. St. 422; *Higgins v. Wilmington, etc., Co.*, 41 Atl. (Del.) 86; *Redford v. Spokane R. Co.*, 15 Wash. 419.

The question whether the defendant was free from negligence as a matter of law is one of greater difficulty. The burden, of course, is on the plaintiff, in order to maintain his case, to show negligence on the part of the defendant. The mere fact that the defendant's car ran into the plaintiff's team or that the accident occurred is not sufficient. *Graham v. Consol. T. Co.*, 44 Atl. (N. J.) 964. Nor is it sufficient to show facts as consistent

with care and prudence as with negligence. *Hayes v. Forty-second, etc., Co.*, 97 N. Y. 259. Negligence is want of due care under the circumstances. If a team is moving on or near the track in front of a car it might ordinarily be negligent for the motorman of the car not to sound the gong, and yet under certain circumstances it might be negligent to sound it, as, for instance, if the team was in a position of danger and was apparently frightened at the car or the sound of the gong (*Lightcap v. Phila. T. Co.*, 60 Fed. 212; 61 Fed. 762; *Benjamin v. Holyoke, etc., Co.*, 160 Mass. 3; *Ellis v. Lynn, etc., Co.*, 160 Mass. 341; *Gibbons v. Railway*, 155 Pa. 279; *Oddie v. Mendenhall*, 84 Minn. 58), but, on the other hand, it might not be negligent to sound the gong or to continue at the usual speed even if the team was frightened, as, for instance, if there was ample room for it and it was not greatly frightened and was apparently under control, in other words, if it was apparently not in a position of danger (*Eastwood v. La Crosse, etc., Co.*, 94 Wis. 163), and a fortiori if there was nothing in the behavior of the team up to the time of the accident to indicate danger. *Henderson v. Greenfield, etc., Ry.*, 172 Mass. 542.

Likewise if a team is tied on or near the track or held standing or driven in a narrow place near the track, the question of negligence on the part of the defendant depends on the circumstances. As shown above, the defendant in running its electric cars has no such superior rights as will permit it to run its cars wilfully or carelessly over persons or into teams upon or near its tracks even though they are there through negligence. On the other hand, rapid transit has become a public necessity, and electric cars cannot turn out. These conditions are generally known and persons using the streets must act accordingly. They cannot rightfully obstruct the cars nor can they place themselves or their property in positions on or near the tracks of the cars except at their own risk, subject to the exercise of due care on the part of those running the cars. If they are guilty of negligence which proximately contributes to the injury, they cannot recover. Those running the cars may expect others to exercise

proper care under the circumstances, and may ordinarily proceed on the theory that those who place their teams near the tracks do so with knowledge of the circumstances and with the understanding that it is safe for the cars to run as usual. Even if the team or vehicle extends so near to the track that there is not room for the car to pass without a collision, the circumstances may be such as to warrant the jury in finding that the accident was due merely to an error of judgment on the part of the motorman using due care in estimating the distance and not due to negligence on his part (*Butler v. N. Y., etc., Co.*, 177 Mass. 191), and the plaintiff's evidence may be such as to show that the collision was due to a mere error of judgment on the part of the defendant's servant in estimating the distance, as, for instance, if it shows that the plaintiff himself likewise erred in that respect, in which case a nonsuit may be ordered. *Patton v. Traction Co.*, 132 Pa. St. 76. If the defendant runs into a vehicle when there is not room enough to pass, it may be *prima facie* evidence of failure to exercise due care under the circumstances, but if the collision is the result of the mules or horses suddenly backing or shying when it is too late for the motorman to stop and when there are no previous indications that the animals are frightened and the car is proceeding as usual, there is no liability. *North, etc., v. Tiffens*, 14 S. W. (Tex.) 1067. If the evidence is conflicting as to whether the lack of room to pass was due to the fact that the vehicle was already too near the track so that the motorman knew or ought to have known it, or to the sudden misbehavior of the horses or mules, it is a question for the jury. *Higgins v. Wilmington, etc., Co.*, 41 Atl. (Del.) 86; *Kestner v. Traction Co.*, 158 Pa. St. 422. The presumption is that teams hitched near a street car track are used to the cars and that the cars may run by them in their usual way.

In the present case the evidence shows beyond dispute that there was room enough for the car to pass and that the accident would not have happened but for the sudden shying of the mules. The defendant would not be liable even if the shying of the mules was caused by the car, provided the latter was proceeding

in a usual or proper manner. If it was not proceeding in such a manner it was because it was moving at an unusual speed. It was solely because of an unusual speed, if at all, that a case has been made out for the jury on the question of negligence. Unfortunately the plaintiff does not appear to rely upon this to any great extent, if at all. There is no allegation in the complaint as to the speed. Apparently no special effort was made at the trial to show such a rate of speed as would in itself, and irrespective of the position of plaintiff's team, show negligence. At the argument he seemed to proceed largely on the theory that the team was already so near the track that it would be hit unless the car was stopped, but the evidence shows the contrary. He relies also in part on the supposed duty of a motorman upon seeing a person or team in a position of danger to get the car under such control as to be able to stop it instantly in case the threatened danger is not averted. But, even assuming that this is a correct statement of the principle, it has no application to the facts of this case. We are then thrown back upon the sole question of speed—upon which the plaintiff does not rely except as incidental to other contentions. It is not contended that the mules shied because they saw the car moving rapidly or because its rapidity produced unusual or undue sounds. Indeed, they did not shy or even appear disturbed until the car was abreast of them. Mere speed or noise, even though they caused the fright of the mules, would not, of course, render the defendant liable unless there was a violation of duty. *Doster v. Charlotte S. R. Co.*, 117 N. C. 651; 34 L. R. A. 481; *Henderson v. Greenfield, etc., Co.*, 172 Mass. 542; *Yingst v. Lebanon, etc., Co.*, 167 Pa. S. 438; *McCerren v. Alabama, etc., Co.*, 18 So. (Miss.) 420; *Ohio V. R. Co. v. Young*, 39 S. W. (Ky.) 415. This is not the case of a team moving upon the tracks in front of the car under circumstances requiring the motorman to have such control of the car as to stop it, if necessary, in order to avoid a collision. It must be treated as the case of a team off the tracks and as if the mules had run away and collided with something else than the car. The fact that it collided with the car is immaterial.

The defendant would have been equally liable, if liable at all, if the mules had shied the other way and struck the telephone pole, though the extent of the damage might not have been so great. The liability, if any, resulted from conducting the car negligently so as to frighten the mules, not so as to run into them. As shown above, the defendant would not be liable for proceeding at a proper speed when, as here, there were no signs of fright on the part of the mules until the car was opposite them. Even if the car were moving at an unusual rate of speed and the mules suddenly ran in front of or against the car, but not in consequence of fright caused by the car there, would be no liability. That would be a pure accident or the result of negligence or conduct for which the defendant was not responsible. *Kline v. Electric T. Co.*, 181 Pa. St. 276; 37 Atl. 522. In the present case there was no evidence as to the actual speed of the car, or that it was going faster than allowed by law—eight miles an hour—at that point, or that it was going faster than reasonably prudent, or as to the circumstances which would tend to show what would be a reasonably prudent rate along that portion of that street. One witness said that the car was going at a “rapid” rate. The plaintiff and another said the rate was “unusually rapid.” These are very indefinite expressions. They are not made with reference to any criterion or standard. To say that a car was going at a rapid rate means little or nothing for present purposes. What would seem a rapid rate to one might not to another. What would be a rapid rate under some circumstances might not be such under other circumstances. Electric cars, moreover, usually have a right to go at a rapid rate. To say that a car was going at an unusually rapid rate means little more, when the rate of speed is all there is that can be relied on as tending to show negligence. On the other hand, these witnesses said that the motorman did not begin to slow down until the accident occurred and that then he stopped the car in from thirty to sixty-five feet, according to the different estimates, and that, too, though the car was on a down grade. This fact controls vague expressions like those

set forth above. *Flaherty v. Harrison*, 98 Wis. 559; *Stafford v. Chippewa, etc., Co.*, 110 Wis. 331; *Graham v. Consol. T. Co.*, 44 Atl. 964. See also *Yingst v. Lebanon, etc., Co.*, 167 Pa. St. 438, on evidence as to rate of speed. Thus, we have a case in which the car might properly proceed at a usual or proper rate of speed, no testimony or contention that there were any unusual sights or sounds, no definite testimony that the car was proceeding at an excessive speed, plaintiff's own definite testimony that the car was stopped in so short a distance as to indicate that its speed was not excessive, that there were no indications of fright until the car was abreast of the mules, that the accident would not have occurred but for their sudden shying, and that there was no time to prevent a collision after they did shy. This was not sufficient to sustain the burden of proof that the motorman failed in his duty. Notwithstanding this conclusion we may add that we deem the case a close one and that it is with considerable reluctance that we sustain the action of the trial court in taking it from the jury and we would even emphasize the need of attentiveness on the part of motormen of electric cars to exercise due care under all circumstances to avoid injury to the persons or property of others.

The exceptions are overruled.

J. A. Magoon, J. Lightfoot for plaintiff.

Castle & Withington for defendant.

PACIFIC MILL COMPANY, LIMITED, *v.* ENTERPRISE
MILL COMPANY, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 11, 1904. DECIDED NOVEMBER 28, 1904.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF HATCH, J.

TRESPASS DE BONIS ASPORTATIS—*evidence of conversion—demand for
property unidentified.*

The complaint averred that defendant "unlawfully and without the consent of plaintiff took into its possession and converted to its use" certain goods and chattels which the plaintiff in its evidence showed were left on certain premises in its possession September 22, 1902, at the end of which day the premises were under landlord and tenant's process for forfeiture of lease placed in defendant's possession. The following day plaintiff's representatives, finding the premises locked and in charge of defendant's keepers, told a keeper that "they had some stuff there in the mill and we come to get it;" that it was "some stock of mouldings and different things there," but "the keeper refused to open the gate or let us have it," saying he was put there by Mr. High of the Enterprise Mill Company, and he gave instructions not to let us take anything away." One of the men acting for the plaintiff saw High, manager of the defendant corporation, enter the premises and "sang out" to him, but got no reply. Held: That it was not a sufficient demand to place the defendant in the position of a wrong-doer, or to justify a finding of the plaintiff's conversion of these chattels; also that a nonsuit asked for lack of proof of demand ought to have been granted and instructions to have been given in conformity therewith.

DAMAGES IN TRESPASS DE BONIS—*mitigation by offer to return chattels.*

An offer to return chattels for the taking and converting of

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which damages were claimed was admissible in evidence, the evidence showing no unlawful taking of the chattels.

EVIDENCE—opinion of value two years before inspecting chattels.

Witnesses who have inspected the condition of a lot of wooden mouldings and of boards may properly state their opinion of their value two years before they inspected them, and it was not necessary for them to know the precise kind of weather or exact place of the exposure.

OPINION OF THE COURT BY HARTWELL, J.

This was an action entitled in the complaint as "case," in which it is averred that "on or about the 22nd day of September, 1902, the plaintiff was lawfully possessed in its own right and owned absolutely certain goods and chattels, to wit, stock of mouldings, carpenter benches, mixed lumber and wood, one ton of coal, hay and feed, parts of wagon, harness, house moving blocks, cribs and lumber trucks, pieces of tamarind and monkey pod for calabashes, one-half barrel of machine oil, and two gallons of cylinder oil. That thereafter, to wit, on or about the 23rd day of September, 1902, defendant unlawfully and without the consent of plaintiff took into its possession and converted to its use said goods and chattels, to the damage of plaintiff in the sum of \$2079.27. That said goods and chattels were of the value of \$2079.27." The defendant's answer was a general denial. March 18, 1904, a verdict was rendered for the plaintiff in "the sum of \$800 with interest at six per cent. per annum." The substance of the defendant's exceptions may thus be stated: To the refusal of the court to strike out certain evidence of the plaintiff; to the refusal of the court to allow the defendant to show that it had made a written offer to the plaintiff after the action was brought in regard to the plaintiff taking away the chattels claimed; to the refusal of defendant's motion for nonsuit on the ground that plaintiff had not proved a demand; to the sustaining of an objection by the plaintiff to the evidence of Peter High that he had "put on two watchmen and instructed them not to let anything go in my absence;" these being the

men whom the defendant company, by Peter High its manager, had placed in charge of the chattels sued for; to the ruling out of certain evidence of the defendant hereinafter mentioned concerning the value of the chattels; to the following instructions given by the court:

"If you believe from the evidence that plaintiff was the owner of the property in question and entitled to the possession thereof and at the time of the commencement of this suit, and that while it was so entitled to such possession, and before the commencement of this suit, it made a legal demand of the defendant for the property, and that the defendant then had the property in its possession and refused and neglected to surrender the same to plaintiff upon such demand, this would be evidence of conversion of the property by the defendant, and the jury should find for the plaintiff."

"To constitute a legal demand of property it is not necessary that the demanding party make use of the word 'demand' or to specify by name or particular description the property demanded, but any demand which makes known to the party on whom the demand is made, that the demandant desires the possession of the property, and informs him, by reference or otherwise, what property he desires possession of, is sufficient to constitute a demand."

To the refusal of the court to give at the request of the defendant the following instructions:

"Unless you find that the refusal of the defendant's watchmen was the refusal of the defendant corporation, such refusal would not be evidence of a conversion by the defendant."

"I direct you to find for the defendant as to the value of any articles not specifically demanded by the plaintiff."

"Conversion is the exercise of dominion over an article with intent to repudiate the ownership of the true owner and in defiance of his rights."

To the denial of the defendant's motion for a new trial on the ground that the verdict was contrary to law and the evidence.

The evidence of the value of the chattels offered by the defendant and ruled out by the court was that of the witnesses Green and Campbell, who had examined the mouldings claimed by the defendant and who were asked: "Assuming that those mould-

ings were in the rack on the 23rd of September, 1902, and that they were moved from that to their present position as you saw them about five or six months ago, can you state what, in your opinion, was the value of those mouldings in September, 1902?" "Assuming that these benches have been worn the past two years, can you state what in your opinion they were worth in September, 1902?" "A small amount consisting perhaps of 100 surface feet of boards" having been pointed out by High as property of the defendant, the witness testified that he "should think perhaps they had deteriorated one-half of their first value" from two years before. He was then asked what in his opinion the value would have been two years ago, to which question the plaintiff objected and the objection was sustained.

The defendant in argument abandoned its first exception. The exception to the ruling out of High's evidence of his instructions to the watchmen is not sustained, the instructions being shown by other witnesses. The offer to return the chattels was admissible in this case. In case of a wrongful taking of another's goods the plaintiff is not obliged to take the goods back if offered after commencement of the action, unless the offer "be accompanied with a tender of costs and intervening damages." *Colby v. Reed*, 99 U. S. 566. But "there can be no manner of doubt that the defendant in actions of trover and *trespass de bonis asportatis*, in cases where the taking was not unlawful and the property is not essentially injured, will be allowed to surrender the property in specie in mitigation of damages."

"Courts, beyond doubt, may in a proper case, where the action is trover or *trespass de bonis*, order the plaintiff to accept the property in mitigation of damages against his wishes; and the rule is that the return of the property in such a case will reduce the damages to those actually sustained for the wrongful taking, together with intervening damages and costs." *Ib.*

"Upon the question concerning the amount of damages to be recovered the court should have adopted the prayer of the defendant, and have instructed the jury that his having given the plaintiff notice * * * that the association had relinquished

all claim to the machinery, * * * and the fact that the machinery had never been appropriated to their use, nor moved from the place where it had always been, should be considered in mitigation of damages." *Delano v. Curtis*, 7 Allen 470.

In case of a wrongful taking of the property, or a wilful and unqualified refusal to surrender it on demand, or when the property has suffered injury or deterioration in value, the defendant cannot compel the plaintiff to take it back, even in mitigation of damages. Redfield, J., in *Kimball v. Gay*, 16 Vt. 129, and cases cited in *Yale v. Saunders*, *Ib.* 242, n. Whether or not by strict rules of pleading a defendant ought to plead such offer puis darrein continuance and obtain an order that the plaintiff accept the property, if not changed in value, which was an early established practice, according to our practice that course was not requisite in a case like this in order to show reduction of the plaintiff's loss. A refusal of a seasonable offer to return the chattels, if in good condition, would lead to the inference that they were what the plaintiff did not want. The vague demand made upon the keepers of the property was not sufficient to place the defendant in the position of a wrong doer or an appropriator of the chattels left by the plaintiff on the premises at about five o'clock on September 22, 1902, when the defendant was placed in possession by the sheriff. The plaintiff had ample time if it desired to take away these things. The defendant did not place them there and cannot be held to have appropriated them unless by some act inconsistent with the plaintiff's exercise of ownership. The demand shown was that May and Arnemann for the plaintiff went to the premises the day after the plaintiff left, and finding them locked and a man stationed inside, as May testified, they "told him we had some stuff there in the mill and we come to get it." (p. 6, Tr. Ev.) "He refused to open the gate or let us have it." *Ib.* "He said he was put there by Mr. High of the Enterprise Mill Company and he gave instructions not to let us take anything away." *Ib.*, p. 7. "I told him the Pacific Mill Company had some stock of mouldings and different things there that belonged to the

company, and we came to get it." On cross-examination, *Ib.*, p. 13. "He said you better go and see Mr. High." *Ib.*

As Arnemann testified, p. 25, *Ib.*, May said to the "two men having charge of the premises," "We want our mouldings and hay;" "but they said they had orders from Mr. High not to let us have anything nor to allow us to go on the premises." This witness says that after they had made their demand on the keepers, and while talking with them outside the gate, they saw High "pass through into the premises," and "I sang out when Mr. High came out of the house and went over to the place where the machines are standing, I sang out to Mr. High and he could not help hearing it beyond any question, and besides that I saw one of the men walking up to Mr. High and talking to him. Mr. High shook his head and went out." *Ib.*, p. 26. The defendant was under no obligation to allow the plaintiff's representatives in the absence of the defendant's manager to enter the premises the following day and select and carry off what they claimed to be their property. Except as to a small quantity of boards, a bale and a half of hay, parts of a wagon and a gallon of machine oil, it does not appear that the defendant later on knew that any of the plaintiff's things were left on the premises. The description of the chattels in the plaintiff's complaint, with the exception of "one ton of coal, one-half gallon of machine oil and two gallons of cylinder oil," is itself too vague for identification. To refuse to allow the plaintiff in the absence of some officer of the defendant corporation to make its own selection and remove what it claimed, was not a refusal to allow it to point out to such officer what it claimed or to allow it to exercise ownership of the property when identified and pointed out. The defendant had a right to lock up its premises and place them in charge of keepers instructed to let nothing be taken away without orders, and the keepers properly referred the plaintiff's representative to the manager. It was not enough that High "could not help hearing" the witness Arnemann when he "sang out."

There was no evidence which justified the finding of the plain-

tiff's conversion of these chattels. In this view a nonsuit ought to have been granted and the instructions asked by the defendant ought to have been given. The first instruction given which was excepted to by the defendant is open to the objection that it assumes that there was evidence of a conversion. The second instruction was favorable to the plaintiff's theory of the case, but perhaps not unduly so. The evidence of value which was ruled out was admissible. Values are particularly subject to evidence of opinions of witnesses who may not be experts, but who "have some knowledge on which to base their opinions." 1 Elliott on Ev., Sec. 685. All the facts on which an opinion might properly be formed in this case concerning the value, two years before, of mouldings and other property after an exposure to weather, could not be laid before the jury in order that it should find the value. *Railroad Co. v. Schultz*, 43 Ohio 270. Nor need the witnesses know all of such facts, as for instance the kind of weather, with reference to rain or shine, and the exact place of the exposure. Their evidence was admissible and its value was to be considered by the jury after such cross-examination as the plaintiff should have seen fit to make.

"It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent of itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify." *Whitney v. Thacher*, 117 Mass. 523.

The exceptions are sustained, the verdict rendered set aside, the judgment that was entered is vacated and the case is remanded to the circuit court of the first circuit for a new trial.

Robertson & Wilder for plaintiff.

Ballou & Marx for defendant.

IN THE MATTER OF THE APPLICATION OF ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, FOR A WRIT OF PROHIBITION AGAINST THE HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, AT CHAMBERS, AND JOHN S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER, A MINOR.

MOTION FOR ORDER TO SHOW CAUSE.

ARGUED NOVEMBER 15, 1904. DECIDED NOVEMBER 30, 1904.

FREAR, C.J., HATCH, J., AND CIRCUIT JUDGE DE BOLT, IN PLACE OF HARTWELL, J.

PROHIBITION—*supersedeas*.

A preliminary order of prohibition expires when the court after hearing makes a final order disallowing the writ of prohibition prayed for. The preliminary order cannot be revived, in the absence of a new exercise of judicial power, by a *supersedeas* allowed on the suing out of a writ of error.

OPINION OF THE COURT BY HATCH, J.

This is an application for an order to the Honorable George D. Gear, second judge of the circuit court of the first circuit, and J. S. Low, next friend of Annie T. K. Parker, a minor, to show cause why they should not be adjudged guilty of contempt of this court for disregard of a preliminary writ of prohibition heretofore issued on the application of Alfred W. Carter, guardian. On September 7, 1904, Alfred W. Carter, as guardian,

applied for and obtained from the chief justice of this court a preliminary writ of prohibition restraining said circuit judge from proceeding on a motion pending before him made by said J. S. Low, next friend of Annie T. K. Parker, a minor, for the removal of said Alfred W. Carter as guardian until the further order of this court. On November 7, 1904, this court rendered its decision, dissolving the temporary writ of prohibition and denying the application for a permanent writ. On November 8, 1904, the petitioner obtained a writ of error to the Supreme Court of the United States, the order granting it stating that it was to operate as a supersedeas. A bond was filed and the papers connected with the writ of error perfected on the same day. The motion for the order to show cause sets out that said circuit judge is about to proceed with the trial of the application for the removal of said A. W. Carter as guardian on its merits, notwithstanding the writ of error and supersedeas.

It is contended by the petitioner that the suing out of the writ of error and the order allowing the same containing the words of supersedeas resulted in suspending the judgment of this court disallowing the writ of prohibition prayed for, and has revived the preliminary order of prohibition granted on the filing of the original application. The petitioner seeks to establish a distinction between law and equity in the operation of a supersedeas on any restraining process which had been issued prior to the allowance of an appeal or writ of error; it being contended that a supersedeas revives a restraining process issued at law, such as a writ of prohibition; but that it does not so operate in equity upon an injunction upon an appeal being taken, is conceded. We do not find that this distinction can be maintained. The conclusion to be drawn from the cases is rather that the difference in effect of operation of a supersedeas depends upon the nature of the judgment or decree appealed from. A supersedeas always operates as a stay of execution and suspends the enforcement of a judgment or decree by execution or other process. But the judgment or decree appealed from may itself have an intrinsic effect which can only be suspended

by an affirmative order, either of the court which makes the decree, or of the appellate tribunal. *Hovey v. McDonald*, 109 U. S. 161. Supersedeas is entirely a matter of statute or rule of court. In our view it has the same effect at law and in equity. The same statute applies. Section 1007 of the Revised Statutes applies equally to proceedings in equity as at law. It is said in the *Slaughterhouse cases* (10 Wall. 296), "Different rules upon the subject prevail in different jurisdictions; but the act of Congress provides that appeals in the Federal courts shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error." The same reasoning also applies in both cases. The supreme court in *Knox Co. v. Harshman*, 132 U. S. 16, says: "The general rule is well settled that an appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effect. When an injunction has been dissolved it cannot be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. A fortiori the mere prosecution of an appeal cannot operate as an injunction when none has been granted." This certainly is as applicable to the case of a writ of prohibition as to an injunction. In *Hovey v. McDonald*, on page 161, it is said: "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a supersedeas were complied with." The law is expressly so held in *Gibbs v. Board of Aldermen of Louisville*, 26 S. W. 186, which was a prohibition case. In that case a preliminary order of prohibition had been allowed, and upon hearing the writ prayed for was denied. An appeal was taken and a supersedeas granted in the ordinary form. The court says: "The writ of prohibition is the order from the superior to the inferior court of limited jurisdiction, prohibiting the latter from acting in a matter out of its jurisdiction; and by Section 475 of the Code the granting or the refusal of the writ is the final order, and when the final order is entered, the temporary prohibitive order is no longer in force in this or any other court, and the

final order being a denial of the writ, the supersedeas affects only the question of costs. The prohibitive order was only intended to protect the litigant until the court could determine whether or not he was entitled to the writ of prohibition; and the court having denied the writ, the effect of a mere preventive order cannot be revived by a supersedeas so as to make the writ of prohibition effective during the pendency of the appeal."

The supersedeas contained in the order allowing the writ of error operates to no greater extent than the supersedeas allowed by the statute. The order asked for does not in terms go any further than the statute would go by its own force and effect, the application being made within the time limited. It operates only upon the proceedings on the application for the writ of prohibition. That is a proceeding by itself. It is distinct from the proceedings in "The amended motion and petition of Annie Thelma K. Parker by her next friend J. S. Low to remove Alfred W. Carter as guardian," in respect to which it was attempted to obtain a suspension of proceedings through the writ of prohibition. To give the supersedeas any effect in regard to the matter last named it should have contained language expressly extending and applying it to such matter. A new restraining order should have been prayed for and obtained in terms applying to such other suit. The form of such an order is set out in 2 Loveland's Forms of Federal Practice, No. 1377 C. All that was asked for and granted in the present case was that the writ of error should operate as a supersedeas. The language of the order is: "It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, the writ of error to operate as a supersedeas, and that the bond for that purpose presented by said petitioner in the sum of one thousand dollars be and the same is hereby approved." This was insufficient to give the order any effect in any proceeding other than the application for the writ of prohibition. That was a matter pending in this court. The proceeding for the removal of Carter as guardian was pending in another court. As was said in *Knox Co. v.*

Harshman, supra, p. 17, "The supersedure of process on the decree dismissing the bill could not supersede process on the judgment at law, and this is so notwithstanding a bill to impeach a judgment is regarded as an auxiliary or dependent and not as an original bill."

As a further reason why the preliminary order in the prohibition proceeding cannot be held to be now in effect, it will be noted that it was by its terms to remain in force only until the further order of the supreme court. When the court acted, as it did in rendering its decision denying the writ prayed for, the preliminary order became *functus officio*. It could not be revived by anything short of a new judicial order.

As the threatened action of the circuit judge would not constitute a violation or disregard of the preliminary writ of prohibition, or of the supersedeas, the order to show cause is denied.

Kinney, McClanahan & Cooper, Ballou & Marx and Robertson & Wilder for petitioner.

J. Alfred Magoon and J. Lightfoot for respondent.

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HAWAIIAN TRUST & INVESTMENT COMPANY, LIMITED, (A CORPORATION), *v.* ANNIE BARTON, HELEN A. DUNNING, A. V. GEAR AND T. F. LANSING (DOING BUSINESS UNDER THE FIRM NAME OF GEAR, LANSING & COMPANY), J. OSWALD LUTTED, J. J. SULLIVAN AND J. BUCKLEY, (THE LAST TWO NAMED DOING BUSINESS UNDER THE FIRM NAME OF SULLIVAN & BUCKLEY).

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 9, 1904. DECIDED DECEMBER 5, 1904.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE ROBINSON IN PLACE OF HATCH, J.

STATUTE OF USES—*in force in Hawaii as early as 1855.*

A conveyance made in 1862 to A., being trustee under the will of R. W. Holt "and his successors in trust for the use and benefit of the legatees named in the last will and testament of Robert W. Holt, deceased, forever," vests the legal title in the testator's daughter Elizabeth, to whom the will devised an undivided fourth of the estate, the statute of uses at the date of that deed being law in Hawaii under decisions in *Kane v. Perry*, 3 Haw. 663, and *Kalae-okekoi v. Kahele*, 7 *Ib.* 147.

STATUTE OF FRAUDS—*parol partition—memorandum.*

Our statute of frauds, not enacting the first section of statute 29 Charles II., does not prevent a parol partition of land, but in this case held: A sufficient memorandum was signed by the parties in interest to show a partition.

CERTIFICATE OF ACKNOWLEDGMENT OF DEED—*not defective by omitting the statutory words "for the uses and purposes therein named."*

The certificate of acknowledgment of a deed is substantially in

the form required by statute, although omitting the words "for the uses and purposes therein named" after the words "that he executed the same freely and voluntarily."

EVIDENCE—*mental incapacity of grantor, records of California adjudication of insanity and order confining in an insane asylum.*

Records of a superior court of California showing that on May 24, 1888, G. A. A., the grantor of deed of October 31, 1898, under which plaintiff claimed, was adjudicated to be insane and ordered by the judge to be confined in the insane asylum, and that in 1900 the judge refused to restore said G. A. A. to capacity, and evidence that by the law of California in 1888 and 1890 a person adjudged insane and committed to an insane asylum could not convey land are inadmissible for the purpose of showing the grantor's incapacity to make the deed.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiff brought an action of ejectment and obtained a verdict in its favor for an undivided fourth of certain land and premises in Honolulu known as the Canton Hotel, basing its claim on a conveyance from George A. Aldrich dated October 31, 1898, who claimed the property by inheritance from his mother, Elizabeth M. Aldrich, one of the devisees under the will of R. W. Holt, and who died intestate leaving four children including the son. By Holt's will his widow received an annuity of \$800 for life. One-fourth of all the rest of his property went to each of his three sons for life over to their respective heirs. The remaining fourth was devised directly to his said daughter. The land was patented by Royal Patent No. 647 dated July 19, 1852, to James Robinson, Robert Lawrence and Robert W. Holt, who owned the land as partnership property. The executor of Holt's will filed a bill in equity against the surviving partners praying for an order of sale of the real estate of the firm and that the proceeds thereof be divided. The surviving partners Robinson and Lawrence in their answer joined in the petition for the order of sale and division of proceeds. The order of sale and division was granted October 18, 1862. November 22, 1862, the parties in said cause by their attorneys

reported that the sale had been made as ordered, and that the parcels of land which in the petition for order of sale were numbered respectively from 1 to 19, had been sold separately for the various sums named in the report, aggregating \$26,680, the executor having purchased them "as trustee under said will for the legatees named in the said will;" the report setting forth that "upon consultation with the respective parties previous to the day of sale it was agreed between them and we were instructed to cause the portions of the said premises specially described in the order of sale as numbers 1, 3, 4 and 5 to be sold together, and also numbers 6 and 7 to be sold together, and also numbers 8, 9 and 10 to be sold together, and also numbers 15 and 19 to be sold together, it being agreed between the said parties that it was for their respective interests that they should be sold." The sale was confirmed by order of Justice Robertson December 3, 1862, the order requiring "the parties and attorneys to make the conveyances necessary for completing the said sale pursuant to the order of sale heretofore made in this cause." December 11, 1862, the attorneys of the said parties filed their report of distribution of the proceeds of the sale, showing that each of the surviving partners had received one-third thereof, amounting to \$8,674.56, and that the executor had received the same sum for the Holt estate. November 22, 1862, an indenture was executed between "William A. Aldrich, executor of the last will and testament of Robert W. Holt, plaintiff or complainant in the suit of chancery hereinafter referred to, and James Robinson and Robert Lawrence, defendants in the said suit of the first part, and William A. Aldrich, executor of R. W. Holt, deceased, and his successors in trust for the use and benefit of the legatees named and referred to in the last will and testament of the said Robert W. Holt of the second part," reciting that at a sale at public auction of partnership real estate ordered by the court in said cause to be sold, and which on comparison with the order of sale appears to include the parcels of land numbered in said order 1, 2, 3, 4, 5, 6, 7 and 14, the last numbered parcel being described as the Canton Hotel

premises, the executor became the purchaser for the sum of \$14,570, and that the parties of the second part in consideration of the receipt of that sum by them granted, bargained, sold, aliened, released, conveyed and confirmed the said eight parcels "unto the said party of the second part and his successors in trust for the use and benefit of the legatees named and referred to in the last will and testament of Robert W. Holt, deceased, forever." The records of the court show that October 31, 1863, the executor with R. G. Davis and the three sons of the testator, being all the devisees mentioned in his will, with the exception of his daughter, appeared before Mr. Justice Robertson, who made the order of sale, and that the executor "presented a statement of proposed division of the estate of Mr. Holt to separate the share of Mrs. Aldrich from that of the other devisees;" that "the sons of Mr. Holt declined to accept the Canton Hotel as set off to them in the division as presented," and that "under the circumstances the court thought wise to offer the Canton Hotel premises for sale at auction at the upset price of \$2500," and that "ten days previous public notice be given of the time and place of sale, it being understood that if the bid of \$2500 is not obtained then the property shall be retained and form a part of the estate;" that November 18, 1863, R. G. Davis and James, John and Owen Holt being present, the executor reported that "the Canton Hotel premises were offered for sale according to an order of sale of this court on Saturday the 14th instant, and that it was not sold;" that he was "willing that the Canton Hotel premises shall stand aside as a part of the share of Mrs. Aldrich at the valuation of \$2500, at which price it has been offered for sale by order of the court. This proposition is assented to by the devisees who are present, viz., James R. and Owen J. Holt;" and that at a later hour of the same day the executor "presented to the court a statement of division of the estate of R. W. Holt, deceased, showing the value of Mrs. Aldrich's $\frac{1}{4}$ on the first August, 1863, to be \$20,817.85. The division as proposed by the executor is agreed to by James R., Owen J. and John D. Holt, the sons, devisees of the decedent,

and by Mrs. Aldrich, all of whom have signed the statement of division in token of their assent," and that "the document is ordered to be marked AA and placed on file." The statement showed the items, "Canton Hotel premises \$2500," and after footing up the investments, amounting to \$83,271.30, " $\frac{1}{4}$ of above is due to Mrs. A., say \$20,817.85," and was signed by the executor, E. M. Aldrich, James R. Holt, Owen J. Holt and John D. Holt.

The defendants excepted to the admission in evidence of the deed of October 31, 1898, on the ground that the certificate of acknowledgment omitted to certify that it was executed by the grantor "for the uses and purposes therein set forth," which are in the form of certificate given by the statute; and also excepted to the refusal of the court to allow in evidence an authenticated copy of a record of the superior court of the city and county of San Francisco showing that George A. Aldrich, on May 24, 1888, was ordered by the judge of the court to be confined in the state insane asylum at Napa, on the ground that "he is insane and is so far disordered in mind as to endanger health, person or property, and is not a case of idiocy, imbecility or simple feebleness of mind, or old case of harmless dementia, or of any class of incurable or harmless insanity or a case of delirium tremens;" and also to the refusal of the court to allow in evidence an authenticated copy of the record of the same court showing a refusal in 1900 to restore to capacity George A. Aldrich; or to allow the defendants to show by the evidence of C. W. Ashford that under the law of California in 1888 and 1890 a person adjudged insane and committed to an insane asylum could not convey land; and that any conveyances or contracts executed under such circumstances and conditions were absolutely void; and further to the refusal of the court to direct a verdict for the defendants on the ground that the plaintiff had shown no title in itself; and to the refusal of the court to grant the defendants' motion for judgment *non obstante* on the same ground.

If the deed ought not to have been admitted in evidence with-

out proof, owing to the defective certificate of acknowledgment by the grantor, or if the evidence offered to show the grantor's insanity was admissible, or if the title to the land was in the executor and not in Mrs. Aldrich, or if the proceedings referred to did not constitute sufficient setting apart of this property to Mrs. Aldrich in severalty, then the verdict cannot be sustained in law.

The plaintiff contends that the legal title was in Mrs. Aldrich, and that a parol partition was made which was sufficient in law under our statute; that the certificate of acknowledgment was radically defective but was substantially in the form required by statute; that a conveyance by an insane person is not absolutely void but merely voidable and cannot be attacked collaterally; also that the evidence of the grantor's insanity was incompetent.

At a former trial of this case the plaintiff was nonsuited on motion of the defendants on the grounds that the plaintiff had not proved title in itself and could only sue as trustee, joining the *cestui que trust*, Aldrich having conveyed the property to the plaintiff as trustee. The order of nonsuit was reversed and a new trial was ordered upon the sole ground, being the only question argued by the defendant, that the plaintiff was not required to sue as trustee or to join the *cestui que trust*. 14 Haw. 681. The plaintiff claims that the defendant is estopped by that judgment from asserting that there is no evidence to support the verdict, and says the evidence at the second trial included all the evidence at the first trial and more. We do not know this, for the evidence at the former trial is not before us in these exceptions. This contention therefore cannot be sustained.

As to the failure of the certificate of acknowledgment to state, not only as it did, that the grantor "personally appeared before" the acknowledging officer and was "known to him to be the same person who executed the foregoing deed," and that "he executed the same freely and voluntarily," but also that he executed the deed "for the uses and purposes therein set forth," we do not

think that the omitted words are a matter of substance. The main object of a certificate is to guard the public against false impersonation and to make sure that the grantor executed the deed. Everyone knows that the written form of these certificates often expresses much more than is actually said, which is apt to be something like this: "This is your deed?" or "Your signature?" or "You acknowledge that you have signed this?" Executing a deed implies that it is executed for the uses and purposes it expresses. It is better to follow the form prescribed in the statute in order to avoid objections to the title, which may involve harmful delays and expense, but as between the conflicting decisions of the Arkansas and Texas courts on the subject which are cited before us, we prefer the view taken in the Texas decision, which is based on the ground that the statement of the purpose is not conclusive. Our statute also provides that "neither the certificate of acknowledgment nor the proof of any instrument shall be conclusive, but may be rebutted and the force and effect thereof may be contested by any party affected thereby." Sec. 1849, C. L.

We think that the adjudication of the California court of the insanity of the grantor and its order for confining the grantor in the insane asylum were not admissible as evidence in this case. No notice appears to have been given to Aldrich in this case that he was represented to be insane, or that the court was to pass upon the question of his insanity. The record shows that Aldrich was "brought before" the judge "for examination on the charge of insanity," and that after the judge had heard the testimony of certain witnesses and satisfied himself "on personal examination" that Aldrich was insane, he made the order for his confinement at the insane asylum. Our statute requires that before appointing a guardian of the person and estate of an insane person "the judge shall cause notice to be given to the supposed insane person of the time and place for hearing the case not less than fourteen days before the time so appointed." Probably the jurisdiction of the California court for committing a person to the insane asylum on complaint and

without notice to the person represented to be insane may be like that given by our statute, which allows this to be done on the ground that "the public safety requires his restraint until he becomes of sane mind." Sec. 646, *Ib.* But an adjudication of insanity cannot have the effect of making a deed by the insane person void unless the adjudication shall have been made after notice given, and unless a guardian shall have been appointed to have charge of the property of the person adjudicated to be insane.

"Any judgment or decree that a person is *non compos* or appointing a guardian for that cause without notice is absolutely void." *Hathaway v. Clark*, 5 Pick., 490. It is immaterial whether or not these records are to be regarded as those of a court of a foreign country as they relate to proceedings in 1888, prior to the annexation of Hawaii. They are not evidence tending in any way to show that Aldrich at the date of his deed in 1898 was mentally incompetent.

The conveyance by the surviving partners and the executor to the executor "and his successors in trust for the use and benefit of the legatees" would create an active trust in respect of the life estate of each of the testator's sons, since the will requires "the income of the same to be paid to him by my executor hereinafter named for his use and support for the term of his natural life;" but in respect of the estate devised to the daughter Elizabeth and her heirs and assigns forever there would be no active duties for the trustee to perform, and under the statute of uses of 27 H. VIII. the legal effect of the conveyance would be to vest the fee in the daughter, her equitable estate being converted by force of that statute into a legal estate. 1 Perry on Trusts, Sec. 298.

"And so the stat. of Henry VIII., after reciting the various inconveniences before mentioned, and many others, enacts, that 'when any person shall be *seised* of lands, &c., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, or years, or otherwise, shall from thenceforth stand and be

seised or possessed of the land, &c., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form and condition, as they had before in the use.' The statute thus *executes* the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession; thereby making *cestui que* use complete owner of the lands and tenements, as well at law as in equity." 2 Black. Com., 333. It is therefore essential to say whether the statute was law in Hawaii at the date of this conveyance. "It may not be a fair inference that the doctrine of uses would be inapplicable in any state where they are not declared not to exist, because no case has arisen in the courts of the state to test the question, or because a form of a deed not known under the statute of uses may have been declared by the statute of a state sufficient to convey lands." 2 Wash. on Real Prop., 481. In *Est. of Boardman*, 5 Haw. 146 (1884), a devise to the testator's daughter of land "to be held in trust for her by my executor" was held to import an active trust and not to be within the statute. The court, after stating the effect of the statute in vesting the legal title in the beneficiary in certain cases, said: "In a case like this we think the statute is wise and that it should be followed here." In *Kidwell v. Godfrey*, 14 Haw. 138 (1902), the court said: "Whether or not the statute of uses is in force in this Territory we need not say. The trust in question is not one within the operation of the statute." These cases do not recognize the significance of the decisions in *Kane v. Perry*, 3 Haw. 663 (1876), and in *Kalaeokekoi v. Kaele*, 7 *Ib.* 147 (1887). In the former of these cases the legal title was held to be in M. in a royal patent based on a land award dated January 8, 1855, issued to "K. for M." The defendant in that case filed a plea in bar, one of the grounds of which plea was that "in law and equity and by force of said patent to K. for M. and her heirs and assigns forever the said M. was entitled to the fee simple thereof." The following

extracts from the defendant's brief, which is on the files of the case, show that the question was clearly presented to the court:

"The statute of uses has not been enacted here, or else this question could not have been raised. But our conveyancing has undoubtedly gone upon the theory that it is law here. The modern deeds, based on the doctrines which have flowed from that statute, have always been used here. The wills and settlements, based on like doctrines, have united to form a basis of the most important titles in the kingdom. The statute gives this court the right to adopt the law of other countries, which is consistent with our own laws and usages, and not opposed to justice and reason. All these elements are now before the court, to authorize its declaring that the statute of uses is part of the law of the land. * * *

"A simple trust to A for B, allowing or requiring no discretionary power in A, clearly should give the fee to B in law; especially in this court, exercising full equitable jurisdiction. * * *

"It is believed that the court will not come to a conclusion which is at variance with the uniform practice of transferring land titles to uses, which has certainly never been contemplated by parties dealing in land titles, and which would plunge the landed estates of the kingdom into a sea of uncertainty and litigation. It is a case where common consent and usage have established the law on the subject, merely requiring the recognition of the court. * * * "

The court sustained the plea on this ground, saying that if "K. was trustee for M., the trustee or his heirs could not eject M. or her heirs or assigns from the occupation of the land, since he held only for her and her heirs." In the second case above mentioned the trial judge in a suit in equity had made a ruling to the same effect concerning a similarly worded patent. The adjudication in the equity suit was held to bar an action of ejectment in which the plaintiff claimed under the trustee. The law of Hawaii concerning the statute of uses must be regarded as having been settled as early as 1855, the date of the land

award in *Kane v. Perry*. According to this conclusion the fee of an undivided fourth of the land conveyed to W. A. Aldrich was in Elizabeth, the testator's daughter.

As to the setting apart of the Canton Hotel premises to the testator's daughter Elizabeth Aldrich in severalty, the memorandum signed by the executor and by the devisees under the will clearly shows that it was agreed that this should be done, and that the hotel property should be a portion of Elizabeth's share of the estate at a valuation of \$2500; and it appears by the record also that this transaction was approved by the court. This was a sufficient setting apart of that property under our statute of frauds, which does not contain the first section of the English statute of frauds or its equivalent. The section referred to is as follows:

"All leases estates interests of freehold or termes of yeares or any uncertaine interest of in to or out of any messuages mannours lands tenements or hereditaments *made or created by livery and seizin onely or by parol* and not *putt in writeing and signed* by the parties makeing or creating the same or their agents thereunto lawfully authorized by writeing, shall have the force and effect of leases or estates at will onely and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for makeing any such parole leases or estates or any former law or usage to the contrary notwithstanding."

Similar provisions frequently appear in the statutes of the several states, as for instance, in the Massachusetts statute, viz.:

"Estates or interests in lands, created or conveyed without an instrument in writing signed by the grantor or his attorney, shall have the force and effect of estates at will only, and no estate or interest in lands shall be assigned, granted, or surrendered, unless by a writing signed as aforesaid, or by the operation of law." Mass. Genl. St., Ch. 89, Sec. 2.

"A voluntary partition of lands could, as we have shown, be made by parol at the common law between parceners and also between tenants in common. But, according to a slight preponderance of American cases, and to a decided majority of the English authorities, the statute of frauds now interposes an

insuperable obstacle to a valid parol partition." Freeman on Partition, Sec. 397.

While holding that in this case there was a sufficient partition under our statute, it is also evident that the same theory was applied to the division of the lands of the deceased partner among those entitled to it under the will which was applied by the court in ordering a sale of the partnership lands for the purpose of dividing the proceeds between the surviving partners and the receipts of the estate of the deceased partner. The sales were apparently *pro forma*, the different interests agreeing on the price for each parcel and who should take it on that valuation, in making up the respective partnership shares.

The exceptions are overruled.

Kinney, McClanahan & Cooper and S. H. Derby for plaintiff.
Robertson & Wilder and Holmes & Stanley for defendants.

CONCURRING OPINION OF FREAR, C.J.

I concur in the foregoing conclusion and in general with the reasoning on which it is based, but desire to make my position a little clearer on the two minor points, that of the certificate of acknowledgment and that of the judgment of insanity. I think that the statute might have made the clause omitted from the certificate essential, but that it did not. Sections 1839, 1840, 1841, 1847, of the Civil Laws, which set forth what an acknowledgment and certificate thereof shall consist of, say nothing of the "uses and purposes," and section 1842, which alone contains those words, provides merely that the "form" shall be "substantially" as set out in that section. This, taken with the nature of the omitted words and the purposes of an acknowledgment as set forth in the foregoing opinion, leads me to conclude that the certificate was not fatally defective. I think the judgment of insanity was inadmissible (1) because the question was not the same in the California proceeding as in this proceeding, that being a proceeding to determine whether it was safe for the accused to be at large, and not to determine whether he had suffi-

cient mind to make a deed, etc., or whether he needed a guardian of his property, and (2) the parties were different. That was not a proceeding in rem with notice by publication or otherwise to the world. *Leggate v. Clark*, 111 Mass. 308.

IN THE MATTER OF THE APPLICATION OF FUKU-
NAGA FOR A WRIT OF HABEAS CORPUS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED DECEMBER 14, 1904. DECIDED DECEMBER 16, 1904.

HARTWELL AND HATCH, JJ., AND CIRCUIT JUDGE ROBINSON IN
PLACE OF FREAR, C.J.

FISHING—*conviction for unlawful fishing.*

Section 1460 of the Penal Laws, in so far as it provides a penalty for wilfully depriving a konohiki of his fishing rights by appropriating the tabooed fish of said konohiki, or otherwise, held repealed by section 95 of the Organic Act, and that petitioner being convicted under said section 1460 was entitled to discharge on *habeas corpus*.

OPINION OF THE COURT BY HATCH, J.

This is an appeal from the first judge of the circuit court of the first circuit. The petitioner, on the 30th day of November, 1904, filed his petition before said circuit judge for a writ of *habeas corpus*. The petition set out that petitioner was unlawfully imprisoned and deprived of his liberty by William Henry, Esquire, the high sheriff of the Territory; that the petitioner was illegally confined in consequence of being convicted by the district magistrate of the district of Ewa, Island of Oahu, on the 26th day of said November, of the offense of mali-

ciously and wilfully appropriating to himself certain tabooed fish, to wit, amaama (mullet), of the konohiki of the sea fishery of Honouliuli, to wit, the Oahu Railway & Land Company; that he was sentenced by said district magistrate to pay a fine of fifty dollars and costs and to be imprisoned at hard labor until said fine and costs were paid; that section 1460 of the Penal Laws, under which petitioner was convicted, was repealed by section 95 of the act of Congress entitled "An act to provide a government for the Territory of Hawaii," and that said district magistrate had no jurisdiction, power or authority to make such conviction or impose such sentence or issue said mittimus; and that all the proceedings had and taken in the arrest and detention of the petitioner were null and void. The return denies that section 1460 of the Penal Laws of this Territory was repealed by section 95 of the act to provide a government for the Territory of Hawaii, and denies that the conviction of the petitioner was illegal.

The act under which the petitioner was convicted is as follows:

"Every konohiki or other person who shall wilfully deprive another of any of his legal rights to fish on any fishing ground, which now is, or may become, free to the use of the people, or who shall wilfully exact from another any portion of the fish caught on any public fishing ground, or who shall wilfully exact of another, for the use of any private fishery, a greater amount of fish than by law he is entitled to receive as his share, and any tenant or other person who shall wilfully deprive any konohiki of his fishing rights, by appropriating to himself the tabooed fish of said konohiki, or otherwise, shall be punished by a fine not exceeding one hundred dollars for every such offense, in the discretion of the court, and in default of the payment of such fine be imprisoned at hard labor not exceeding three months." Sec. 1460, P. L.

Section 95 of the "Act to provide a government for the Territory of Hawaii" is as follows:

"Sec. 95. That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Terri-

tory of Hawaii not included in any fish pond or artificial enclosure shall be free to all citizens of the United States; subject, however, to vested rights; that no such vested rights shall be valid after three years from the taking effect of this act unless established as hereinafter provided."

It is contended on the part of the respondent that section 1460 of the Penal Laws did not confer a fishing right and that it does not come within the terms of the repealing act. This is placing too narrow a construction upon the repealing act. The whole subject matter of private rights of fishery is covered by this act. The intent of Congress is clear to destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the people. When a right or privilege granted by statute is repealed, any penalty provided for the violation of such right falls also. No express words of repeal are necessary. The result follows by necessary implication. When the object and reason for which a statute was passed are removed by a later enactment this is held an implied repeal of the former statute. Ency. of Law, vol. 26, p. 736. Where a statute alters the quality and incidents of an offense, as by making that which was a felony merely a misdemeanor, it would be construed as impliedly repealing the old law. Endlich on Interpretation of Statutes, Sec. 238. *Hayes v. The State*, 55 Ind. 99. *A fortiori* must thus be the case where an act formerly a penal offense is relieved of all criminality. Making the sea fisheries free is inconsistent with maintaining an act to punish a trespass upon such fisheries criminally. All rights of fishery, however, were not destroyed by the repealing act. That act was inoperative as far as vested rights are concerned. Such private rights of exclusive fishery in the sea as were vested rights at the time of the passage of the Organic Act were not affected by the passage of that act and continue as rights of property notwithstanding the repealing words of section 95. This was settled by *Damon v. Hawaii*, 194 U. S. 154. Such rights will remain rights of property until they may be destroyed by condemnation and the payment of value. Whether the waters in which they exist are

navigable or not is of no consequence. All such rights as may come within the category of vested rights are saved from the operation of the repealing act. In our opinion no others are. Can any vested right be claimed in section 1460 of the Penal Laws, or in that portion of it under which the petitioner was convicted? The portion of the section in question furnished a remedy merely. It gave the right to proceed criminally against one for depriving a konohiki (land owner) of his fishing rights. The law is well settled that there can be no vested right in a remedy. *Re Mechanics', etc., Bank*, 31 Conn. 63. It was fully within the power of Congress to withdraw the criminal remedy. The right of action is not lost. There remains the same right of civil action for trespass upon a fishery as exists in the case of a trespass upon land.

The petitioner is entitled to his discharge.

George A. Davis for petitioner.

Ballou & Marx for respondent.

M. V. SILVEIRA v. L. AHLO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 14, 1904. DECIDED DECEMBER 19, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

LEASE—no estoppel of lessor to claim rent by reason of refusal of two months' rent accompanied by promise of new lease.

A lessor by declining rent for two months after the burning off of the buildings on the leased premises, there being about five years unexpired on the term of the lease, and by telling the tenant that he would give him a new lease for a longer term, but without mentioning the rental or the length of the term, is not estopped

from claiming the rental on the existing leases after offering a new lease to the tenant, which the tenant declined; nor is the lessor thereby estopped from denying that the leases had been surrendered.

Id.—*leasing premises to a third person subject to existing leases.*

The lessor, by granting a lease for fifty years to a third person subject to the existing leases, does not thereby grant to such third person the right to the rental for the residue of the terms of the prior leases.

Id., *EVIDENCE*—*unrecorded certificate that new lessee takes lease subject to former leases.*

The defendant having shown a lease of the premises demised to him made by the plaintiff to a third person for a term of fifty years, the plaintiff may place in evidence an unrecorded certificate by the new lessee that he took his lease subject to the former leases.

Id.—*destruction of buildings on leased premises by fire ordered by the board of health.*

The destruction of the buildings on the leased premises ordered by the board of health does not operate as a surrender of the lease, the lessee not having taken steps to surrender it.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiff brought assumpsit claiming \$4,467.20, rent due and payable on two leases from himself to the defendant, one dated April 10, 1888, demising certain land on Nuuanu street in Honolulu for fifteen years from May 1, 1888, at a monthly rental of \$30, and the other dated January 17, 1890, demising another parcel on the same street for fifteen years from January 1, 1890, at a monthly rental of \$130. The rents claimed are \$4,160 on the first lease from January 1, 1900, to February 28, 1902, and \$307.20 on the second lease for the years of 1900 and 1901. The plaintiff obtained a verdict for the sum claimed by him. The case comes up on the defendant's exceptions to three rulings concerning evidence made during the trial, the latter of which only is relied on in argument, namely, allowing the defendant to put in evidence a declaration or certificate dated June 26, 1900, by J. P. Mendonca to the effect that he knew that the pieces of land on Nuuanu street, described in a

lease of the land leased to defendant on the same day made to him by the plaintiff for a term of fifty years from October 1, 1900, were then under lease to the defendant, referring to the leases above mentioned, and further certifying that his own lease was "granted subject to" said leases to the defendant. The remaining exceptions are to the refusal to give instructions one and eleven for the defendant and to giving instructions one to sixteen (not including thirteen) for the plaintiff; also to a certain portion of the charge "not asked by either party in regard to surrender and cancellation of the leases."

The facts shown by the evidence are that about January 1, 1900, the premises of the defendant upon the land demised to him on leases declared upon were burned by order of the board of health at the time of the plague visitation. The wooden buildings on the land leased to defendant were burned January 10, the contents of a stone building in the rear having been burned December 31. The premises were "quarantined from December until May," (defendant's evidence, pp. 36, 51.) The plaintiff declined rent for January and February on the ground that he advised a new lease which he said he would give, and that it would not be worth the defendant's while to build brick buildings on land within the fire limits requiring brick buildings for the short time, five years, remaining of his leases. The defendant's brief says that "thereupon and until the 23rd day of August, 1901, ineffectual attempts were made to procure the execution of a lease." From the evidence, however, it appears that after many discussions between the parties concerning rental for a new lease, a form of lease was finally drawn up by the plaintiff and submitted to the defendant on November 9, 1900, which was submitted by the defendant to his attorney, Mr. Castle, who noted in pencil changes proposed by him to make the monthly rental of \$300 named therein \$180 for the residue of the terms of the old leases and to modify the condition therein expressed that the lessee should conform to the board of health regulations. The defendant says that the last talk he had with the plaintiff on the subject of a new lease was in

November of that year, when he took that lease back to Mr. Bolte, the plaintiff's agent, and told him "Your lease is no good," (p. 23, *Ib.*), and that it was for that reason that he "wouldn't sign the lease," (p. 24). The defendant "never had any further conversation with him," (p. 26). In December Mr. Castle drew up a form of lease which he proposed, which Mr. Bolte declined to take. There had been many discussions between Bolte and Ahlo about a new lease. The defendant testified that Bolte "proposed that I should cancel the lease. I said no, I wouldn't do that. I propose to rebuild brick buildings," (p. 16). "I asked Bolte why he refused to take my rent. He said by and by." That was early in March or late in February (pp. 20-21). In the latter part of February, 1900, "I asked Bolte for a new lease," (p. 27). He said, "All right, he would make a new lease," (p. 31). To the question whether he "declined to follow Bolte's suggestion of giving up the remainder of the old term," the defendant answered, "Because I wanted to build a one-story house there;" (p. 41), "that is the reason why I won't give it up. When the rent was due I went down there to pay him over the rent. He refused to accept it, otherwise I would have built the buildings there long ago." To the question, "And when you went there on the first of February to pay that rent you were insisting upon keeping your old lease for the balance of the term, were you?" A. "Yes, as I wanted to build a one-story house there." Q. "And at no time did you request Mr. Bolte to cancel that lease of January, 1900, did you?" A. "No." Q. "Have you at any time expressed a desire to have your lease cancelled?" A. "No," (p. 42). The defendant having testified that during quarantine time he made inquiries about the cost of new buildings, was asked, "Did your steps continue after the quarantine was raised?" A. "Well, I couldn't take any steps in the matter because when I tendered the rent to the lessor he refused to accept my rent." Further on the defendant testified, "After the quarantine I took steps for the building of two-story buildings because I asked Mr. Bolte about the lease. He promised that he would give me a

new lease for that; then I took steps in the matter for the building of two-story buildings," (p. 43). The defendant testified that he had secured \$30,000 at eight per cent., meaning by "secured" that "the party promised that they would lend me the money in case I got a good lease," (p. 44). In October of 1900, when Bolte spoke to him about paying the rent, the defendant said that if Bolte would give him a new lease he could raise some money and would then pay the back rent, (p. 47). Campbell, book-keeper for the defendant's attorney, testified that he went with defendant to Bolte's office and tendered the rent for January, which Bolte refused, saying that it was "because he wanted to—he was going to re-arrange the whole matter," (p. 65). "He told me he was going to—wanted to make a new lease there, and my recollection is that he was—his reason for making a new lease was that he wanted to combine all the property," (p. 66). He said "Ahlo would be better off if he got a new lease," and that he didn't care to continue that old lease; * * * but Ahlo's position was that he declined to give up the old lease. * * * He insisted on going on with the rest of the term of the old lease * * * and wanted me to make these arrangements which never were done," (p. 68). "He said he was going to talk with Ahlo about it," (p. 69). Bolte testified that the draft of lease submitted to him by Castle was not executed "because Ahlo had no money." The Castle draft, he says, was "satisfactory on the whole," (pp. 86-87). There is no evidence that any steps were taken by Ahlo or his attorney in the matter after submitting to Bolte the Castle draft of a proposed new lease until June 5, 1901, when Castle wrote to Bolte the following letter:

"Dear Sir:—

With regard to the matters now standing between L. Ahlo and yourself, I have to suggest the following:

First. Fire Claims: Ahlo is willing to take 5-27 of the amount awarded for the buildings erected by him as the full amount of his claim, and whether he makes a new lease or the old lease is cancelled, he is not to be liable for any rents from

the time of the fire to the date upon the cancellation of that lease.

Second. To make a lease of the premises now or recently held by him under lease from your principal of forty-five years, at a monthly rental of \$225, terms and conditions to be practically similar to those of the old leases, except, of course, he is to erect good fire proof buildings.

Third. Should you succeed in settling with Ahi so that Ahlo could lease the entire block between Chaplain lane and Pauahi on Nuuanu street, he will pay \$310 per month.

Kindly let me hear from you on this matter at your earliest convenience."

August 23, 1901, Castle wrote to Bolte as follows:

"Dear Sir:—

With reference to the matter of lease with L. Ahlo, I desire to say that having had another conference with him, and saying in my opinion, there is no hope of meeting you on the subject of rent, he has decided to abandon the matter entirely, and suggests that the present leases be cancelled upon even terms; that he will execute the cancellation of the leases at any time you desire, but, of course, reserving to himself his interest in the award for losses by fire by the fire claims commission."

There is no evidence of any answer to either of the above letters. Bolte says with reference to the tender of rent in January that he "advised Ahlo to cancel his two leases and sit still until the plague is over, and then come and talk new leases business," (p. 92). He also says that in his draft of a lease he left the lessor's name blank "because I didn't know who the lessor would be," evidently referring to the fifty year lease to Mendonca, whose agent Bolte was (pp. 86 and 89).

The defense is (1) that the plaintiff's course amounted to a waiver of rent and of a formal surrender of the lease; (2) that the lease to Mendonca of fifty years gave him the rental, precluding the plaintiff from claiming it; and (3) that the plaintiff, by inducing the defendant not to erect temporary buildings on the land by promising him a new lease, by refusing rent for January and February and making no demand for it until August of the following year, and by leasing the land to another,

estopped himself either from claiming rent or that the lease had not been surrendered. The defendant's claim of the inadmissibility of Mendonca's certificate that his lease was subject to defendant's leases is based on his claim that he "had a right to rely upon the record and to say to the plaintiff, 'You have granted an estate inconsistent with my estate and it destroys the value of it. I have a right and do treat this as a surrender.' The plaintiff concealing the fact of the existence of this document cannot turn up at the trial and offer to show that the instrument on record is a different instrument from what it appears. This is elemental."

We are aware of no rule which precluded the plaintiff from showing the arrangement between himself and his lessee, or of any obligation resting upon him to inform Ahlo of the transaction. • By reason probably of the same person acting as agent for the plaintiff and his lessee, Mendonca, the plaintiff was not precluded by his lease to Mendonca from giving the defendant the lease he offered in November. A grant of the reversion, unless otherwise agreed, would give the grantee the right to future accruing rent, but the grantee may agree that the grant shall not carry the rent. *Burden v. Thayer*, 3 Metcalf 76; *Harmon v. Flanagan*, 123 Mass. 288. The exception to the introduction of the certificate is not sustained.

The question of the implied surrender and acceptance of the surrender was for the jury under appropriate instructions which were given by the court. The instructions which the court gave, to which the defendant excepted, were based upon the theory that there was no estoppel in the case. The instructions for the defendant which the court refused were based on the theory that there was evidence on which estoppel could be found. Looking solely at the defendant's evidence we are unable to discover in the case an element of estoppel. The proposal, offer or promise by the plaintiff to give a new lease and his advice to the defendant not to erect buildings on the premises under his old lease did not justify the defendant in relying upon getting a lease on such terms as he should desire. There was no definite promise

and could be none until the rent and other conditions of a new lease should be agreed upon. *Parker v. Cartwright*, 7 Haw. 596. In order that an estoppel result from conduct the conduct must be intended to influence the person claiming an estoppel, and also must be such as reasonably might influence him. *Kauhi v. Keoni Liaikulanani*, 3 Haw. 356. "In order that the representation or act of a party shall operate as an estoppel, it must be clear that it was made advisedly, or at least 'negligently in disregard of the rights of others who are reasonably authorized to rely upon them.'" *Ib.* p. 357, citing *Keane v. Rogers*, 9 B. & C. 577. The defendant gave up his plan of erecting a temporary building in the hope that he would succeed in bringing the plaintiff to such terms for a new lease as would be satisfactory to himself and enable him to raise money for a permanent building. His failure to accomplish this was due to no bad faith or breach of agreement on the part of the plaintiff. The suggestion that the plaintiff's course was a gross fraud on the defendant does not accord with mutual understandings in business dealings between men of average intelligence. The plaintiff performed his promise in tendering a lease to the defendant. The only evidence concerning the lease proposed by the defendant's attorney in December of 1900 is that of the plaintiff, and it is uncontradicted, that it was in the main satisfactory to himself but was not executed in consequence of the defendant being unable to raise the money for the proposed building. The letters of the defendant's attorney contained the first proposal to give up the leases, but on condition that no rent be required. The plaintiff's failure to answer them did not estop him from claiming the rent. The refused instructions incorrectly assumed that there was evidence that the plaintiff had elected to adopt a course inconsistent with his relying upon the existing leases, or, in other words, that he relied on the defendant taking a new lease; that he abandoned and waived all rights under the old leases; that his conduct was such as could reasonably have led the defendant to give up a plan which otherwise he might have carried out, of making a temporary building by relying upon a

promise of the plaintiff for a new lease; that he had repudiated the relation of landlord and tenant and "told the defendant that the leases were terminated," and that his case was one in which "the aid of the court is invoked to give effect to a dishonest purpose." In *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544, cited in 11 Ency. L., 426, which is one of the defendant's citations in support of his instructions, the court said: "An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made." *Greton v. Smith*, 33 N. Y. 245, and *Welcome v. Hess*, 90 Cal. 507, are cases cited by the defendant. The former case was an action for rent for the year ending May 1, 1854. The parties agreed prior to that date that the plaintiff should rent the premises to the defendants for ten years at \$275 a year, on which agreement the defendants continued in possession, paying the first quarter's rent at the agreed rate, until November 1, when the plaintiff refused to give the agreed lease or to allow the defendants to continue occupancy, and he resumed possession. The plaintiff admitted the agreement and that defendants remained in possession and paid for the first quarter on the strength of the agreement, basing his defense on the agreement not being in writing and also upon his having tendered a lease in October which the defendants refused. The plaintiff's conduct prior to tendering this lease and after receipt of rent for the first quarter was such that the defendants could not expect to remain on the premises. He said that he would "sign an instrument prohibiting the defendants from continuing the business for which they had agreed to lease the premises, * * * and boasted that he had the defendants in his power and could turn them into the street if they did not accede to his terms; * * * denied that the defendants were his tenants and repudiated any agreement." The court instructed the jury that under such circumstances the defendants were justified in abandoning the premises when they did and that they were not liable for any rent. That case certainly does not conform to the case before us. In *Welcome v. Hess* it was held that there was an implied accept-

ance of a surrender, the tenants having abandoned the premises and sent the keys to the landlord, who took possession of the premises and re-let them for a period longer than the remainder of the term without notifying the lessees that he should do so on their account or that he should continue to hold them liable for rent. Held that the landlord was estopped from denying that he had accepted surrender. The cases cited by the defendant do not appear to sustain his contention on the subject of estoppel. The defendant requested the court to instruct the jury that he was "not liable for rent for any time he may have been deprived of the beneficial enjoyment of the premises by act of the civil authorities during the quarantine," citing *Coogan v. Parker*, 2 S. C. 255, 16 A. R. 659. In that case the tenant had a seven years' lease of a building in the city of Charleston to be used as a restaurant. During the civil war the building had been so injured by the bombardment as to be uninhabitable. After the evacuation of the city the military forces took possession of the premises, of which, however, the defendant afterwards regained possession, which he kept until the termination of the lease. The court said: "It is not necessary to inquire whether a sufficient ground existed for a rescision, for it does not appear that the defendant took any measures to rescind the lease," and held the defendant liable for the rent for "not having established a rescision of the lease." In the present case the letters show an arrangement for the defendant receiving part of the money awarded for the destruction of his buildings and the evidence shows that he did not rescind the lease. We therefore cannot sustain the exception to the refusal of this instruction.

The exceptions are overruled.

Robertson & Wilder for plaintiff.

Castle & Withington for defendant.

MARY A. RHODES v. HONOLULU RAPID TRANSIT &
LAND COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 15, 1904. DECIDED DECEMBER 19, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

STREET RAILWAY COMPANY—*action by wife.*

An action may be maintained by a wife in her own name against a street railway company, the husband having paid her fare in her presence on her behalf, and she having ratified his act.

ID.—*connecting line.*

The Hotel street line of the H. R. T. & L. Co. and the King street line of said company become connecting lines at the point where said Hotel street line enters King street on the north side of Nuuanu stream. A passenger on said King street line going toward Palama is entitled to a transfer to a King street car going toward Fort street.

ID.—*ejection of passengers—failure to produce ticket.*

A rule requiring a passenger to pay a fare or present a transfer in order to be entitled to ride upon a car of a street railway company is a reasonable rule. Where a passenger is entitled to a transfer, but has failed to obtain it through the fault of an agent or conductor of a street railway company, it is the duty of the passenger upon boarding a car upon a connecting line to pay the fare demanded by the conductor and seek redress against the company for a violation of the passenger's right in refusing the transfer.

ID.—*damages.*

including damages for humiliation, mental suffering, injured feelings, etc.

A passenger wrongfully refused a transfer to a connecting line by a street car company is entitled to compensatory damages,

OPINION OF THE COURT BY HATCH, J.

This was an action by Mary S. Rhodes, a married woman, against the Honolulu Rapid Transit & Land Company, defendant, for damages for injuries done to plaintiff by the servants of the defendant corporation in ejecting plaintiff from a car of the defendant. The case was tried before a jury on the 2d day of May, 1904. A verdict was found for the plaintiff with damages in the sum of \$500. The bill of exceptions sets out thirty-one exceptions taken by the defendant during the trial and duly allowed. The defendant summarizes the exceptions under four heads as follows:

"1st. Can the action be maintained by the wife, contract having been made by the husband?

2nd. The right of the plaintiff to a transfer at Palama junction?

3rd. Whether the conductor on the King street line had the right to demand a fare and threaten to eject plaintiff if not paid?

4th. Whether the rule of damages applied by the court was correct?"

The evidence shows that the plaintiff and her husband had attended services at St. Clement's church on Wilder avenue on Sunday, the 31st day of May, 1903. The husband, desiring to go to the office where he was employed on Fort street, between King and Merchant, took a Hotel street car at the corner of Makiki and Wilder avenue, inviting his wife to accompany him, and paying her fare. On reaching the corner of Fort and Hotel streets the husband alighted from the car, having made the arrangement with his wife that she should remain on the car and proceed to Liliha street and should there transfer to a King street car and return to the corner of Fort and King streets, where he would meet her, and they would then proceed together on the King street car until they arrived at the station nearest their residence. The plaintiff resides on Young street, near Aloha lane. The Hotel street line and the King street line join at two places, namely, at Palama junction above referred to and at McCully street; the distance from Wilder avenue and Makiki

street to Aloha lane via McCully street being about one and one-half miles; via Palama junction, five miles. On arriving at Palama junction the plaintiff asked for a transfer to the King street line going south. The conductor refused it. When she stated to him that she had received one before at that point he told her that she had gotten it unlawfully. She still demanded the transfer. The conductor again refused to give it to her. At the corner of Liliha and King streets the plaintiff left the car, waited in the rain for a King street car returning toward town, boarded it at the front of the car hoping to find some one on board whom she could ask to pay her fare. She did not find anyone whom she could ask for the fare. The conductor demanded from her a fare. She explained that she had been refused a transfer by the conductor on the Hotel street car and that she did not have any money. The conductor assured her that she would be put off the car unless she paid her fare. He thereupon rang the bell, stopped the car, and the plaintiff under compulsion left the car and walked in the rain to the corner of Fort and King streets to meet her husband. The plaintiff claimed damages, according to the following particulars, and at the request of her counsel the jury was instructed that it might consider each of these claims:

- “(1) The tone and manner of the conductors respectively.
- (2) The publicity of the act of refusing the transfer and requiring and compelling plaintiff to leave the car.
- (3) The inconvenience she suffered.
- (4) Her condition in respect to nervousness or embarrassment.
- (5) Any shock to her feelings or sensibilities.
- (6) Any immediate effects the acts alluded to may have had upon her.
- (7) The injured feelings of the plaintiff.
- (8) The indignity she endured.
- (9) Her mental sufferings.
- (10) Her humiliation and wounded pride.
- (11) Any bodily harm or suffering naturally occasioned by the incident.
- 12) To award plaintiff an amount that would reasonably

compensate her for all injury, directly or naturally flowing from her expulsion from defendant's car, including the immediately antecedent circumstances, bodily or mental pain and suffering and any physical disability which was the direct result of defendant's act."

No special damage seems to have resulted to the plaintiff other than the fact that she was nervous and did not sleep well for two or three days, that she was exposed to the rain and compelled to walk perhaps a quarter of a mile to the corner of Fort and King streets, being not in robust health. She was able, however, to call at the office of the superintendent of the defendant company the next day to make her complaint.

1st. Can the action be maintained by the wife, the contract having been made by the husband?

The defendant's contention here is based on the fact that the husband paid the fare of the wife. It does not necessarily follow that the contract for transportation must be taken to have been a contract with the husband alone. The plaintiff, by her action in boarding the car, showed that she was desirous to accept the transportation tendered by the defendant. Her conduct supplied every element of the implied contract for transportation necessary to be shown to establish a contract on her own part. The payment of the fare by the husband might be taken as a payment at the instance and request of the plaintiff, or as the honoring of an order by her for the amount. This would leave the plaintiff the maker of the contract for her own transportation. If, on the other hand, the transaction is considered as a contract made by the husband, it was made for the benefit of the wife, in her presence, and was ratified, adopted and acted upon by her at the time. This gave her the right to sue upon the contract in her own name. 7 Ency. Law, 2 Ed., 109.

2nd. The right of the plaintiff to a transfer at Palama junction.

The provisions of the statute, Act 69, Laws of 1898, under which defendant obtained its franchise, bearing on this subject are:

"Section 9. 1st. Any person riding upon the cars of said railway shall be liable to pay for such transportation the following rates: For a continuous ride anywhere between Diamond Head and Moanalua, or makai of a line drawn parallel to the sea coast, and one and a half miles distant therefrom, not to exceed five cents, provided that children under seventeen years of age in going to and from school, shall not be required to pay over half fares, for which purpose tickets shall be issued.

3rd. Upon a continuous trip, persons riding upon the cars and transferring from one car to another, upon a connecting line within the limits above mentioned, shall be entitled to a transfer ticket without the payment of an extra fare upon the lines of this railway.

4th. The said association and others shall make reasonable and just regulations with the consent and approval of the Governor regarding the maintenance and operation of said railway on and through said streets and roads; and the said association and others failing to make such rules and regulations, the superintendent of public works with the approval of the Governor may make them. All rules and regulations may be changed from time to time as the public interests may demand at the discretion of the Governor. * * * "

The defendant contends that the plaintiff was not entitled to a return trip on the one fare. This is certainly correct. The plaintiff, however, did not seek a return trip. A return trip would mean retracing one's steps over the same route taken in going. On the contrary the plaintiff desired to proceed over a connecting line to her destination which was not her point of departure, nor was it on the line taken by her when she first boarded the car. The defendant further contends that admitting that at Palama junction the King street line becomes a connecting line with the Hotel street line, the plaintiff was entitled to a transfer only for a continuation of her journey in the same general direction as that taken by her upon the start. Did the legislature intend this? The argument in support of this proposition is based chiefly upon the contention that if the right to a transfer were not so limited it would be in the power of a person to board a Hotel street car going north, transfer at Palama junction to a King street car going south, transfer

at McCully street to a Hotel street car going north, and thus continue making that circuit as long as he saw fit. That, of course, would be making an unlawful use of the defendant's road and would subject a person when detected to removal from the car as a trespasser. The only force in the argument is that of the convenience of the defendant company. With the law construed in the way it contends for, it would be easier to prevent such fraudulent use of its road. On the other hand, many cases may occur where it would be entirely reasonable that a passenger should be entitled to a transfer in order to complete a bona fide journey, though he might, to a certain extent, double back on the course first taken by him. This is what was decided in *Dickey v. H. R. T. & L. Co.*, 15 Haw. 303. An argument based chiefly on the convenience of the defendant in the transaction of its business should not be given much weight if it involves a disregard of the reasonable demands of the traveling public. In *Dickey v. H. R. T. & L. Co.* the plaintiff boarded a King street car going east and demanded a transfer at McCully street to the Hotel street line which, if he remained on the car, would have carried him back in a north and westerly direction to Palama junction, thence up Liliha street. The decision in that case was made to rest upon the construction given that the plaintiff was traveling in one general direction only away from his starting point. The reasoning in the case, however, goes further than that. It is pointed out that "there is no requirement in the statute that each five cent ride shall be in one general direction;" and it is further decided that the company cannot by a mere rule make a line a connecting one for some purposes and a non-connecting one for other purposes. We find no sound basis on which to rest a distinction in the ruling to be made respecting transfers at the McCully street junction or at the Palama junction. If at McCully street a transfer may be demanded which would take a person who has come from town on a King street car first toward the mountain, and then back toward the town on the Hotel street line, an equal right should exist to a transfer such as the plaintiff

demanded. The plaintiff was proceeding upon a continuous ride within the permitted district. No meaning can be given to the word "continuous" which would limit the right to a transfer to a car going in one direction only. Continuous means unbroken, and primarily is used in regard to time; but in the statute controlling this case "continuous" is to be construed in connection with the words "within the limits above mentioned." This eliminates any idea of direction, and the only construction which can be given to the entire section is that the right is given to go in an unbroken journey between any two points within the given limits over any connecting line or lines by whatever route it may be necessary to take to reach the point of destination. The passenger's choice of route is unlimited. As it is not clear that the legislature intended that the right to transfer at connecting points should be limited, the court cannot add such a material qualification to the statute by construction. The Hotel street line and the King street line in fact become connecting lines at the point where the former enters King street after crossing the Nuuanu stream. They remain connecting lines to Liliha street. We hold therefore that the plaintiff was entitled at Palama junction to a transfer which would authorize her to ride back in a southerly direction toward Fort street, and that as a consequence she would be entitled to travel on such transfer to the terminus in that direction of the King street line. This the plaintiff would have been entitled to under the rule of the company in force at the time. See plaintiff's exhibit No. 1. We base our decision, however, upon our construction of the statute.

3. Whether the conductor on the King street car had the right to demand a fare and threaten to eject plaintiff if not paid.

The authorities on this proposition are in hopeless conflict. The law, as contended by the defendant, that a conductor of a railway is not compelled to take the word of a passenger, or of several passengers, as to whether or not the passenger is

entitled to ride, and that as between the conductor and such passenger the payment of the fare or the production of a ticket is the only evidence of such right which the conductor is obliged to accept, is fully supported by the following cases: *Crowley v. Fitchburg R. R.*, 70 N. E. Rep. 56 Mass.; *Townsend v. N. Y. C. Ry. Co.*, 56 N. Y. 295; *West. Md. Co. v. R. R. Co.*, 34 Atl. 880 Md.; *Frederick v. M. H. & O. R. R.*, 37 Mich. 342; *Boylan v. Hot Spgs. Ry. Co.*, 132 U. S. 146; *Hufford v. G. R. & I. Ry.*, 53 Mich. 118; *Bradshaw v. R. R.*, 135 Mass. 407; *Poulin v. Can. P. Ry.*, 52 Fed. 197; *Mackay v. Ohio R. Co.*, 11 S. E. 727, W. Virg.

The reason of the rule, as set out in *Bradshaw v. S. Boston Ry.*, is that the conductor cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car, or even to receive and decide upon the verbal statement of others as to the fact. The conductor has other duties to perform, and it would then be impossible for him to ascertain and decide upon the right of a passenger except in the usual simple and direct way. The circumstances would not be favorable for a correct decision in a doubtful case. In *Hufford v. G. R. & Ind. Ry. Co.*, 53 Mich. 120, Judge Cooley says: "No other rule can protect the conductor in the performance of his duties or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares. If, when a passenger makes an assertion that he has paid fare through, he can produce no evidence of it, the conductor must at his peril concede what the passenger claims or take all the responsibilities of a trespasser if he refuses, it is easy to see that his position is one in which any lawless person with sufficient impudence and recklessness may have him at disadvantage, and where he can never be certain if he performs his apparent duty to his employer that he may not be subjected to severe pecuniary responsibility. Such a state of things is not desirable either for railroad companies or for the public." This is confirmed in the recent case of *Mahoney v. Detroit St.*

Ry. Co., 93 Mich. 612. The court said: "It is a novel doctrine that one may compel the agent of another to accept without question, and without opportunity to investigate, his verbal statement that he has a contract with his principal and especially where frequent frauds upon the principal must invariably result as a consequence of such a doctrine. It was the plaintiff's reasonable and clear duty to pay his fare and seek redress from the defendant for a violation of his contract." In *Townsend v. N. Y. C. & H. R. R. R.*, the court bases its decision upon the further ground that conceding that the passenger was entitled to transportation, he had not the right to take the law into his own hands to enforce such right if denied by the agent of the carrier. The court said: "If, after this notice, he waits for the application of force to remove him he does so in his own wrong. He invites the use of the force necessary to remove him, and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such cases." In the recent case of *Monnier v. N. Y. C. & H. R. R. R. Co.*, 175 N. Y. 281, the duty of a passenger in a public conveyance to conform to all reasonable rules and to yield for the time being to the decision of the conductor of the car, in case the passenger has no ticket to show for his right to travel, is reaffirmed. The court said: "In this case the plaintiff acted upon the principle that if he could ultimately prove that the ticket office was not open when the train started, and that he could not procure a ticket, he had the right to refuse to pay the nineteen cents and to resist the conductor by force when he attempted to put him off. It would be difficult to show that such a principle has any support in reason, justice or authority. It is based upon the notion that the plaintiff had the right to be the judge of the controversy and to enforce what he deemed to be his rights with the strong arm, and if worsted in the struggle,

to sue the railroad for assault and battery. That, I think, is not the law; * * * but as in this case, when the conductor demands only what he has the right to demand by the statute and rules of the company, a passenger is not at liberty to assert and maintain by force some right that he may claim which grows out of facts not within the knowledge of the conductor, and which may render the rules inoperative and inapplicable. He is bound for the time being to yield to the reasonable practice and requirements of the officer in charge of the train and enforce any right which he may have against the company in some other and more proper way. By paying such a demand his cause of action is just as complete as if he forcibly resisted the demand and suffered himself to be ejected. His ejection in such case will add nothing to his cause of action." The plaintiff strongly contends that *Bradshaw v. R. R.*, *Poulin v. Can. P. Ry.*, and *Mackay v. Ohio R. Co.* were determined on the ground of the contributory negligence of the plaintiff in not examining carefully the ticket given him and having the mistake corrected. It is true that the question of contributory negligence arose in those cases, but it does not seem to have been the controlling factor and does not weaken the reasoning of the court on the main proposition. On the other hand, it has been held that a passenger cannot be expected to make a technical examination of transfer slips which may be given him. *Lawshe v. Tacoma Ry. Co.*, 59 L. R. 350.

The principal cases cited by the plaintiff are: *Sloan v. So. Cal. Ry.*, 111 Cal. 668; *Hamilton v. Third Av. Ry.*, 53 N. Y. 25; *Murdock v. B. & A. R. R.*, 137 Mass. 293; *B. & O. R. R. v. Bambrey*, 16 Atl. 67 Pa.; *Head v. Ga. Ry.*, 7 S. E. 217, Ga.; *St. Louis A. & T. Ry. v. Mackie*, 9 S. W. 451; *Hufford v. G. R. & I. Ry.*, 64 Mich. 631; *Yorton v. M. L. S. & W. Ry.*, 54 Wis. 234; *W. Pac. Ry. Co. v. Pauson*, 70 Fed. R. 585; *N. Y. Lake E. & W. R. v. Winters*, 143 U. S. 60; *Lake Erie, etc., R. R. v. Fix*, 88 Ind. 381; *Ellsworth v. C. B. & Q. Ry. Co.*, 63 N. W. 584, Iowa; *Louisville & N. R. Co. v. Gaines*, 36 S. W. 174, Ky.; *Bonser v. N. Park St. Ry. Co.*, 97 Mich. 565; *Laird v. Pitts-*

burg Trac. Co., 166 Pa. St. 4; *Gulf, etc., Ry. v. Halbrook*, 33 S. W. 1028, Texas; *Mabry v. City Elec. Ry. Co.*, 59 L. R. A. 590. Many of these cases may be distinguished from the case at bar, falling as they do into one or the other of the following two classes: First, cases in which the plaintiff had a ticket of some sort, and the question involved was the construction, effect or validity of such ticket. As was said in *Mahoney v. Detroit St. Ry. Co.*, 93 Mich. 612, such cases are not applicable to a case where a plaintiff attempted to ride without any ticket at all, relying solely on his right which he could only substantiate by his own statement. Coming within this class are: *Head v. Ga. Ry.*, *Yorton v. M. L. S. & W. Ry.*, *W. Pac. Ry. Co. v. Pauson*, *N. Y. L. E. & W. R. R. v. Winters*, *Ellsworth v. C. B. & Q. Ry. Co.*, *Louisville & N. R. Co. v. Gaines*, *Bonser v. N. Park St. Ry. Co.*, *Laird v. Pittsburg Trac. Co.*, *Gulf, etc., Ry. v. Halbrook*. Second, cases in which it appeared that the plaintiff relied upon the assurances and directions given by the agents of the carrier and it was held that he had a right to rely upon such assurances and directions. Within this class are: *Hamilton v. Third Av. Ry.*, *Murdock v. B. & A. R. R.*, *St. Louis A. & T. Ry. v. Mackay*, *Hufford v. G. R. & I. Ry.*, *Lake Erie, etc., R. R. v. Fix*. Both of the foregoing classes of cases differ so substantially in their facts from the case at bar that we think they should not be here followed. The distinction referred to in the second of the foregoing classes is clearly recognized in Massachusetts, the plaintiff being held entitled to recover in *Murdock v. B. & A. R. R.* on the ground that he had a right to rely upon the statement of the defendant's agents, and that this circumstance distinguished the case from *Bradshaw v. S. Boston R. R.* *Hamilton v. Third Av. Ry.*, 53 N. Y. 25, specially relied upon by the plaintiff, was not followed in *Townsend v. N. Y. C. & H. R. R. R.*, 56 N. Y. 295, and was practically overruled by the latter case. In *Hamilton v. Third Av. Ry.* the car going no further, all the passengers were directed to transfer to another car. It evidently became the duty of the conductor of the second car to observe the passen-

gers who alighted from the first car, and a mistake made by him would be at his own peril. See *Mahoney v. Detroit St. Ry Co.*, 93 Mich. 614. As to *Sloan v. So. Cal. Ry.*, 111 Cal. 668, counsel differ as to whether at the time the ticket was taken up by the first conductor she was informed that she might ride from San Bernardino to San Diego on another train without any evidence of her right to do so. This fact does not appear in the report of the case, but it is stated that on arriving at San Bernardino she (the plaintiff) was required to change cars and enter another train of the defendant. We think the statement fairly brings the case within the second of the above classes. If she was "required" to change cars it was not a step taken of her own volition. It may be fairly assumed that she was obeying the instructions of the defendant's agents in making such change. She would be fully justified to rely upon such directions. Aside from this consideration, we consider that *Sloan v. So. Cal. Ry.*, *B. & O. Ry. v. Bambrey*, 16 Atl. 67, and the other cases relied upon by the plaintiff, in so far as they are applicable to the present case, are outweighed by the cases first above quoted cited by the defendant.

We hold therefore the regulation of the defendant company requiring a passenger to pay the fare or present a transfer was a reasonable one, and that the conductor of the King street car was justified in directing plaintiff to leave said car for the reason that she did not comply with such regulation. This does not deprive the plaintiff of her right of action against the defendant for being improperly refused a transfer by the conductor of the Hotel street car. Her right of action accrued at the time such transfer was refused. As was said by Judge Cooley in *Hufford v. G. R. & I. Ry. Co.*, 53 Mich. 120, the passenger gains nothing by being put off the car and loses nothing by paying what is demanded and staying on; and as was said in *Monnier v. N. Y. C. & H. R. R.*, supra, by paying such a demand plaintiff's cause of action is just as complete as if he forcibly resisted the demand and suffered himself to be ejected. His ejection in such case will add nothing to the cause of action.

In adopting the foregoing rule we do not desire to be understood as going any further than the facts in this case require. Each case of this nature must depend largely upon its own facts.

4. As to damages.

The plaintiff was not entitled to recover damages for being removed from the King street car, it not being contended that any undue amount of force was used by the conductor of such car in causing the plaintiff to alight from it. The defendant's instruction requested on this point should have been given. The plaintiff, however, was entitled to full compensation for the injury done her in the refusal by the conductor of the Hotel street car to give her the transfer demanded. This would include compensation for humiliation, wounded pride, mental suffering, shock to her feelings or sensibilities and the inconvenience she suffered naturally occasioned by the incident, also bodily harm, if any were inflicted upon her. The tone and manner of the conductor and the publicity of the act in the refusal of the transfer might also be considered. *Mabry v. City Elec. Ry. Co.*, 59 L. R. A. 590; *Lake Erie, etc., R. R. v. Fix*, 88 Ind. 381; *Laird v. Pittsburg Trac. Co.*, 166 Pa. St. 4; *Sloan v. So. Cal. Ry. Co.*, 111 Cal. 668; *B. & O. R. R. v. Bam-brey*, 16 Atl. 67. The jury evidently based their verdict in part upon the ejection of the plaintiff from the King street car, and as no damage can be allowed for this act, and as it may be assumed that the jury gave as much weight to that branch of the plaintiff's case as to the wrongful refusal of a transfer, we consider that the damages should be reduced one-half. Upon the plaintiff filing within ten days a remittitur for one-half of the damages named in the verdict, the exceptions will be overruled; otherwise a new trial is ordered. The case is remanded to the circuit court for the first circuit. The plaintiff is allowed costs in this court as well as in the circuit court.

H. E. Highton and T. M. Harrison for plaintiff.

Castle & Withington for defendant.

THOMAS MILNER HARRISON *v.* J. A. MAGOON, F. B. McSTOCKER, L. C. ABLES, DOROTHEA EMERSON (NEE LAMB), T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN AND GEORGE D. MOORE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 6, 1904. DECIDED DECEMBER 19, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

PRACTICE—*specifying errors relied on as ground of motion for a new trial.*

A motion for a new trial need not unless required by the court specify the errors alleged to have been made during the trial and relied upon as a ground for a new trial, but unless specified, so that it may appear that the court ruled upon them expressly, they are improperly presented in a bill of exceptions not filed within the requisite time after the entry of the judgment.

NONSUIT—*misjoinder of parties defendant.*

A nonsuit is properly ordered upon failure of the plaintiff in an action against joint contractors to prove that any of the defendants executed or ratified the agreement declared on.

EVIDENCE—*insufficient to show ratification of agreement.*

Four partners of a Hagey Cure Co. signed an agreement in New Zealand whereby the company took in the plaintiff and another as new partners, agreeing to give them £2,250 if, after a certain trial they were not satisfied with the conditions of the business. The three partners resident in Honolulu did not sign or authorize the signing of the agreement. Letters were received in Honolulu from one of the partners in New Zealand mentioning that they had "sold one-half interest in Tasmania for 8,000 sheep and £500" and that "the sale of Tasmania was for nine-twentieths of the territory,"

and that one of the partners (not having signed the agreement), was coming to Honolulu and would "put things to you as they are." About the same time the partners here received an 18 per cent. dividend on their stock, a small portion of which appeared to have been derived from the Tasmania sale, as shown by the trial balance received at the same time. Held: That this was not evidence on which the partners in Honolulu could be held to have ratified the agreement.

AGREEMENT—construction of—several liability.

An agreement purporting to be made between the H. Co., composed of C., K., M., P., M., McS., A. and L. of the first part and G. and H. of the second part, whereby "the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated" is an incomplete agreement for the purpose of forming the proposed partnership unless all the parties sign; there being an implied term in the agreement that all should sign in order that the signers incur several liability. There being no partnership formed in this case in consequence of the failure of four of the parties to sign the agreement, no partnership rights or duties were created by the incomplete agreement.

OPINION OF THE COURT BY HARTWELL, J.

This was an action of assumpsit for breach of agreement declared on in a former action brought by the plaintiff against Magoon, McStocker, Ables and Emerson, in which the declaration was held bad for non-joinder of the other parties to the agreement, which appears in the report of the case. 13 Haw. 339. The plaintiff then joined the other parties and obtained a verdict which was set aside on exceptions on the ground that the court erroneously instructed the jury that the agreement was within the scope of the business of the articles of association of the A. P. & I. H. Co. The articles appear in the report of the case. 14 *Ib.* 420. At the next trial the plaintiff was nonsuited because in addition to several other reasons which in the view we take of the case are immaterial, the evidence did not show that the defendants Magoon, McStocker or Emerson had authorized or ratified the agreement. The nonsuit was ordered November 9, 1903, judgment thereon was entered November

12. Defendants moved for a new trial November 14 for errors at the trial as well as in granting the nonsuit. January 15, 1904, the motion was dismissed and time for filing the bill was extended. But, unless the filing of the motion suspended the entry of the judgment, the exceptions taken during the trial were not presented within the time required by statute. A motion of the defendants to dismiss the bill on the ground that the exceptions taken at the trial were improperly incorporated in the bill was denied on the ground that the exception to the nonsuit required consideration. 16 *Ib.* 170. We are of the opinion that the only exception in the bill which was presented within the time required by law is that which was taken to the dismissal of the motion for a new trial. The remaining exceptions, which were taken to rulings during the trial, were not "incorporated in the bill of exceptions and presented to the judge" "within twenty days after final judgment or such further time as may be allowed by the judge," as required by the statute (Laws of 1903, Act 32, Sec. 18). The motion for a new trial, although properly made, as held in the previous decision (*Ib.* 176) did not suspend the judgment or operate as an extension of time within which to incorporate such exceptions in a bill or present the same to a judge. The motion for a new trial was based specifically upon an alleged error in granting the nonsuit and of course the correctness of the ruling on the motion for a new trial may be considered by this court in so far as the granting of the nonsuit is concerned. The motion for a new trial was based also generally upon alleged errors occurring during the trial. Such a motion may properly be based on the general averment of errors committed during the trial provided a specification of the errors is not required by the trial judge or ordered by him at the request of the opposite party. The rulings are usually fresh in mind and there would be no occasion to delay argument until preparation of the transcript. But it does not follow that an exception to a denial of the motion for a new trial would bring before the appellate court all errors thus generally relied on in the trial court. We

cannot say that the circuit court in denying the motion ruled upon any question of law concerning its rulings during the trial, or that any question of law relating thereto arose at the hearing on the motion. The plaintiff may have relied on the ground named in his motion that the nonsuit ought not to have been granted on the evidence. At any rate he did not obtain specific rulings on the correctness of any of the trial rulings and therefore there is no question before us concerning them. The only exceptions which we can consider are those which are taken to rulings made by the circuit court "whenever any question of law shall arise in any trial or other proceeding." Sec. 1436, C. L. The only question which we can consider is whether the nonsuit was right. If, on the evidence, a finding that the agreement was ratified by Magoon, McStocker and Emerson would not have been justified, then as far as they are concerned the nonsuit was right. This court has held that the powers of attorney under which the names of Magoon, Emerson and McStocker were signed to the agreement did not authorize the signing. 14 Haw. 424. The evidence at the former trial which the plaintiff offered to show as ratification of the agreement was certain letters which were ruled out, and upon the competency of which for the purpose for which they were offered the court declined to pass in ruling upon the exceptions to the verdict. *Ib.* 425. The plaintiff claims that the agreement was ratified by the partners in Honolulu because, after learning from Australia that the partners there had "sold one-half interest in Tasmania for 8,000 sheep and £500" and that "the sale of Tasmania was for nine-twentieths of the territory," and that Moore, one of the partners, was coming to Honolulu on his way to Texas and "will put things to you as they are," they had failed to inquire of Moore concerning the exact terms of that agreement; and the plaintiff especially contends that when the partners here received about October 30, 1897, the 18 per cent. dividend, a portion of which was derived from the Tasmania sale, as shown by the trial balance received by them at the same time, their keeping that portion of the dividend and

failing to make inquiry as to the terms of the agreement amounted to deliberate and intentional ignoring of the terms, which would be equivalent to ratifying them. If it be true, as the plaintiff claims, that the partners resident in Honolulu had sufficient information from the letters, trial balance and accounts transmitted with the 18 per cent. dividend to apprise them that a new partnership had been formed according to the methods adopted when they themselves entered the business and when Wolfenden was admitted in Australia, and that a portion at least of the dividend was derived from the sale of the Tasmania territory, which sale according to the methods of the concern involved the taking in of a new partner, and also assuming that they regarded the Tasmania sale and the taking in of a new partner as unauthorized by them, it does not follow that they could have inferred from any of these things that any personal liability was incurred by the latest agreement concerning Tasmania and taking the plaintiff Harrison into the partnership. Nothing which had been done before, whether with or without their authority, could have led the Honolulu partners to imagine that an agreement had been made in Australia purporting to bind them jointly and severally to pay the new partner Harrison 2,250 £ if he should not be satisfied with the Tasmania business. It is not a case in which parties are chargeable with knowledge of all the facts because they knew or had reason to suspect the existence of some of them. The circumstances did not impose upon the Honolulu partners a duty to follow up a line of inquiry in order to ascertain the extent of the new liability attempted to be placed upon them. In *Parker v. Cartwright*, 7 Haw. 605, the opinion of Dole, J., refers to the law concerning "ignorance of facts of which the parties might have informed themselves," of the effect of "ignorance due to deliberate negligence," and to circumstances which place parties "upon their inquiry," and require that they should "have sought for information from available sources." Many decisions on this subject are cited in the plaintiff's brief, but they do not apply to the facts of this case. There was no evidence on which the jury

could properly have found a ratification of this agreement. As to accepting the dividend: As the court held in the former case, "If the acceptance be in ignorance or under misapprehension of any of the essential circumstances relating to the transaction, this will absolve the principal from all liability by reason of any supposed assent to the previously unauthorized act of the agent." *Ib.* We therefore sustain the nonsuit as to the defendants Magoon, McStocker and Emerson and there is no occasion, as far as these defendants are concerned, to discuss the correctness of any of the other rulings, since unless the agreement was either made or ratified by them they cannot be held under it. But the plaintiff claims that the court ought to have nonsuited the plaintiff as far only as these defendants are concerned and permitted him to take judgment against the others who did execute the agreement. The statute, he says, required him to implead all the obligors and therefore he ought not to be deprived of his remedy against the other defendants. The statute does not require persons to be impleaded who are not in fact obligors. A declaration would be good if framed to meet the case of an agreement entered into by only a portion of the names appearing in it and not joining the names of others signed by attorney provided the plaintiff is willing to admit and avers in his declaration that the other names were signed without authority. By declaring against all, however, he took the chances of being able to show that they had all executed the agreement, and was liable to "be nonsuited at the trial if he fail in proving a joint contract," (1 Ch. on Pl., 51), unless this was an agreement binding upon the defendants severally as well as jointly.

In considering the demurrer in the first action the court construed the agreement that "the parties of the first part for themselves individually and the said company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated" as being in effect that "the parties of the first part do hereby jointly and severally make with the parties of the second part the following agreement of

partnership." 13 Haw. 360. It is contended on behalf of the defendant Ables that this was *obiter dictum* and the court is not precluded from now considering whether a several liability was created by the agreement. In passing upon the demurrer the court decided upon the effect of not joining all of the contractors, but unless the declaration alleged a joint liability it would have been unnecessary to join them if there was a several liability. The declaration appears to have been framed upon the theory of joint liability of the defendants Magoon, McStocker, Ables and Emerson. If they were jointly liable the other parties to the agreement were so also, and perhaps it was unnecessary to pass upon the question of several liability. We consider the question open for re-consideration. The agreement purports to be "made this 20th day of September, 1897, between The African Pacific and Indian Hagey Company, an association of partnership formed in Honolulu, Republic of Hawaii, April 10th, 1897, the said partnership being composed of the following members: T. E. Cowart, J. H. Kirkpatrick and Geo. D. Moore, of the state of Texas, United States of America, A. E. Powter, of Montreal, Canada, J. A. Magoon, F. B. McStocker, L. C. Ables and Dorothea Lamb, of Honolulu, Republic of Hawaii, all parties of the first part, and Alfred Edward Gilmore and Thomas Milner Harrison, both of the city of Auckland in the colony of New Zealand, parties of the second part." It is not clear in what sense the words "individually" and "collectively" are used. To hold that the members of the original partnership, in using the word "individually," intended that they should be severally bound if all were not would be going further than we think is authorized by the agreement. In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: "Whether or not, if it shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, and * * * are questions which have not yet arisen and upon which no opinion is expressed." 14 *Ib.* 532. The court evidently had

in mind the question whether the agreement would be complete unless all signed or ratified. Courts sometimes classify agreements between several persons as "incomplete" if not signed by all who are named in them. This is on the theory of an implied term that all are severally bound in case only of all signing. In looking at the present agreement we reach the same conclusion by applying the theory of an implied term and by looking at the words used and the intended object. It is essential to a partnership agreement that each person mentioned as a partner severally agrees upon being so; and each of such persons can if he likes agree that the proposed partnership shall do certain things, or that the old firm of which he is a member shall enter into the new partnership and then do certain things. We do not see any such undertaking in the language used in this agreement. "In order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it." 2 Chit. Cont., 11 Am. Ed., 1354. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any one of them unless all execute or subsequently ratify the agreement. The thing to be agreed upon was that all the parties named and not certain of them should form a partnership. If no partnership was formed then there were no partnership rights or duties created by the incomplete agreement. The agreement which purported to be made between the Hagey Co., composed of Cowart, Kirkpatrick, Moore, Powter, Magoon, McStocker, Ables and Lamb of the first part and Gilmore and Harrison of the second part, was that the Hagey Co. collectively and its members individually "do hereby constitute and accept the said parties of the second part as partners as hereinafter stated." The partners who signed did not severally agree that they severally would form

a partnership with Gilmore and Harrison but that all of the partners did so. The agreement was ineffective for the purpose of forming a new partnership in consequence of the failure of certain of the Hagey Co. partners to execute it, and therefore Gilmore and Harrison were not constituted or accepted as partners and acquired no partnership rights. The views above expressed render discussion of the other exceptions unnecessary.

The exceptions are overruled.

Robertson & Wilder for plaintiff, who also appeared in person.

J. A. Magoon and J. Lightfoot, Kinney, McClanahan & Cooper and *S. H. Derby* for defendants.

ALBERT BARNES *v.* CHARLES R. COLLINS.

APPEAL FROM DE BOLT, CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED DECEMBER 7, 1904. DECIDED DECEMBER 19, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

PARTNERSHIP—*what constitutes.*

A partnership exists when two or more persons agree to share, as co-owners or principals, the profits of a business.

Id.—*proof.*

While the question of whether a partnership is created or not is one of intention, by which however is meant, not what the parties call the relation into which they enter or what they understand its result will be, but what its legal effect is, and while no single fact may be conclusive proof of a partnership in all cases,—a strong case is made out presumptively by an agreement of two persons that they are “jointly and equally interested” in two leaseholds held in their respective names, that “any profits that may accrue” from the leaseholds shall be “equally divided between them, and

that they shall "share equally any and all expenses that may arise in the handling" of the leaseholds, and when the circumstances leading up to the agreement and the subsequent acts of the parties support rather than refute the theory of a partnership.

OPINION OF THE COURT BY FREAR, C.J.

This is a bill in equity for the dissolution of a partnership and for an accounting. The defence is that there was no partnership. The circuit judge found that there was a partnership and ordered an accounting. The defendant appealed.

The theory of the plaintiff, which was sustained by the circuit judge, is that the plaintiff and defendant entered into a partnership with reference to the ownership and management of two leaseholds, one of which was taken in the name of the plaintiff and the other in the name of the defendant; that the agreement between the parties was subsequently put in writing; and that this agreement together with the circumstances leading up to it and the subsequent acts of the parties all go to show a partnership. The written agreement is as follows:

"Know all Men by these Presents, that we Albert Barnes and Charles R. Collins, both of Honolulu, and of the Territory of Hawaii, are jointly and equally interested in the following pieces of property, viz.: That certain leasehold, situate on Liliha Street, and being the same premises heretofore occupied by, and which were purchased from Frank Northrup, by the said Charles R. Collins, and also that certain leasehold lately the property of E. B. Thomas known as "Kawehewehe," and which premises situate at Waikiki, were purchased by the said Albert Barnes from the said E. B. Thomas. It is mutually agreed that the said Barnes and Collins shall share equally any and all expenses that may arise in the handling of these two aforementioned leaseholds, and that any profits that may accrue from these leaseholds shall be equally divided between the aforesaid Barnes and Collins, share and share alike. In Witness whereof the parties hereto have hereunto, and to a like document, set their hands and seals, this 5th day of November, A. D. 1900.

(Sig.) A. BARNES,
" C. R. COLLINS."

The defendant contends that the party alleging a partnership must prove it; that strict proof of a partnership is required as to parties *inter se*; that an agreement to form a partnership must be definite and certain; that the evidence in this case wholly fails to establish a partnership between the parties; that the fact that real property is held in the joint names of several owners or in the name of one for the benefit of all is no evidence of a partnership; that mere community of interest or joint ownership does not create a partnership; that in the present case there was not even joint ownership, or common property, or community of interest in the subject matter of the pretended partnership; that even a participation in the profits and losses does not necessarily establish a partnership; that it is not stated in the written agreement that the parties were to be partners and there is nothing said about a firm name; that the document is not in the form of a partnership contract; and that a partnership cannot be formed by implication or operation of law nor against the intention of the parties themselves. All this may be true and yet in our opinion the finding of the circuit judge is fully sustained by the evidence.

What constitutes a partnership is a matter of some diversity of opinion, but in general it may be said that, according to what is called the modern doctrine, a partnership exists where the parties have contracted to share, as common owners or principals, the profits of a business and that whether an agreement creates a partnership or not depends upon the intention of the parties. But by the intention of the parties is meant, not what they call or consider the relation into which they enter, but what the relation is in legal effect. The parties may expressly agree that there shall be a partnership and yet such agreement will be ineffective if the specific stipulations do not establish a partnership as matter of law, and on the other hand they may expressly agree that their relation shall not be that of partners and yet it may be such as matter of law. Perhaps there is no single element that will necessarily show as a matter of evidence that a partnership was intended. Even an express agreement that the

parties shall share in the profits and losses will not, it is said, necessarily establish a partnership, but such an agreement would be strong presumptive evidence of a partnership, and even an agreement to share in the profits with no agreement as to the losses would be presumptive evidence of a partnership. If the right to share in the profits is merely by way of compensation in lieu of salary or wages for services performed or of interest for money loaned or of rent for land or of compensation for acting as agent and not by virtue of ownership of the profits, there is not a partnership. The natural inference is, in the absence of a contrary showing, that if one has a right to share in the profits it is because he is a co-owner of the profits. If in addition to a right to share in the profits there is also a liability for losses or expenses the case is greatly strengthened, for agents or servants or loaners of capital are not usually liable for losses or expenses. Of course there need be no partnership name, nor need it be stipulated that there shall be a partnership, nor is it necessary that the partners should understand or realize what the legal consequences of their agreement will be. The question is whether that which they have agreed upon constitutes a partnership as matter of law; that is, did they agree to become co-owners of the profits?

In the present case it is expressly agreed that the parties shall "share equally all and any expenses that may arise in the handling" of the leaseholds and that "any profits that may accrue from these leaseholds shall be equally divided between" them "share and share alike." It is also expressly agreed that the parties "are jointly and equally interested in" the leaseholds. This written agreement is *prima facie* proof of a partnership. The extraneous evidence strengthens rather than weakens this presumption. It shows that the parties discussed the purchases of these leaseholds and together examined the property before making the purchases; that the defendant put up \$250 and the plaintiff \$750 for the purchase of one of the leaseholds and that the defendant afterwards paid the plaintiff \$150 on account, the defendant furnishing all the money for the

other leasehold; that while each had most to do with the leasehold held in his name, they frequently consulted each other as to the management of both leaseholds; that they presented statements of account to each other at times, although this was done more particularly by the plaintiff; that the plaintiff paid some of the expense connected with the leasehold held in the defendant's name; and that the defendant paid some expense connected with the leasehold held in the plaintiff's name, used some wood obtained from trees on that leasehold and had something to do with procuring one of the tenants upon that leasehold. The defendant has not sustained any other theory. Indeed he seems to rely entirely on the supposed weakness of the plaintiff's case.

For a fuller statement of the principles involved and illustrative cases, see 22 Am. & Eng. Enc. of Law, 2nd Ed., pp. 13 to 44; *Meehan v. Valentine*, 145 U. S. 611; *Lathrop v. Wood*, 1 Haw. 121; *Tucker v. Metcalf*, 3 Haw. 180; *Bishop v. Everett*, 6 Haw. 157; *Jubey v. Puni*, 6 Haw. 369; *Strohm v. Wilson*, 10 Haw. 302; *Blaisdell v. Burns*, 13 Haw. 507.

The decree appealed from is affirmed and the case is remanded to the circuit judge for such further proceedings as may be necessary.

W. A. Whiting and *C. F. Clemons* for plaintiff.

J. J. Dunne and *W. T. Rawlins* for defendant.

THE RIGHT REVEREND LIBERT HUBERT BOEY-
NAEMS, BISHOP OF ZEUGMA, *v.* MALIE K.
PAAHAO.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 7, 1904. DECIDED DECEMBER 27, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

NONSUIT—when some essential evidence excluded, and other essential evidence not offered.

When a plaintiff has rested, and much evidence essential to his case has been struck out or excluded, but other essential evidence has not been offered, a nonsuit may be ordered and the striking out or exclusion of the essential evidence is harmless.

CORPORATION SOLE—Bishop of Catholic Church, not a.

The Bishop of the Roman Catholic Church in Hawaii is not a sole corporation and cannot take by succession from his predecessor in office. To sustain ejectment, he must show a privity of title or estate between himself and his predecessor, if he claims under his predecessor, whether he claims by paper title or adverse possession.

OPINION OF THE COURT BY FREAR, C.J.

This is an action of ejectment for 85-100 of an acre of land situated at Kalihi, Oahu, covered by L. C. A. 10,498, R. P. 3546 to Nahinu, part of a lot containing 1 63-100 acres, originally enclosed by one stone wall and used, according to plaintiff's claim, for forty years or so as a site for a catholic church and a burying ground. The action was begun by the Right Reverend Gulstan F. Ropert, Bishop of Panapolis, but before the trial

his death was suggested and the present plaintiff, his successor in office, was substituted in his place.

At the close of the case the court, on defendant's motions, struck out much of the plaintiff's evidence and then ordered a nonsuit. The plaintiff brings the case here on an exception to the order of nonsuit and a number of exceptions to rulings striking out or excluding evidence.

It will not be necessary to consider these exceptions in detail or to set forth the various steps upon which the plaintiff relies in tracing his title from the original awardee or patentee. Probably the order of nonsuit would have been technically correct in view of the fact that the plaintiff's most important evidence was struck out, even if it would not have been correct in case that evidence had been allowed to remain, in which case we would be thrown back upon the question of the correctness of the rulings under which that evidence was struck out or excluded. On the other hand, if the order of nonsuit should have been made even if that evidence had not been struck out or excluded, the rulings on the evidence, even if that evidence was material and relevant as far as it went, would not be prejudicial or harmful to the plaintiff. The order of nonsuit was properly made if any link in the plaintiff's chain of title was missing—which, as we shall see, was the case. We may proceed on broader lines, as the plaintiff himself has done largely in his argument and brief.

The main difficulty in the case seems to have been to connect the present plaintiff with his predecessor in title. There is no dispute that the present plaintiff is Bishop Gulstan's successor in office, but was it shown that he was also his successor in title? It is contended that the predecessor in office had both a paper title, at least to some interest in the land, and also title by adverse possession. No evidence was introduced or offered to show descent or a devise or conveyance or even an oral transfer from Bishop Gulstan to the present bishop. It is contended that the plaintiff was not obliged to show any such connection between the two bishops after his case was practically destroyed

by striking out or excluding much of his material evidence, but that he may well rely upon his exceptions and the errors in the rulings already made. We cannot, however, take that view, at least when, as in this instance, the greater portion of such evidence was not struck out until both sides had rested. The order of nonsuit must be sustained if the entire evidence, both that admitted and that offered but excluded, does not show a case upon which a verdict for the plaintiff could be sustained.

We may assume for present purposes that even a parol transfer from one adverse holder to another would be sufficient to preserve a privity of estate or title between them and avoid an interruption in the continuity necessary to support a claim of title by adverse possession; in other words, that the successive possessions of several holders may be tacked together even though the connection between them rests solely in parol. We may go further for present purposes and assume that a parol transfer is sufficient to sustain an action by one claiming title by adverse possession even after the adverse possession of his predecessor has ripened into a good title by the expiration of the statutory period. We may also assume that, as is contended by the plaintiff, one may acquire title by adverse possession merely as trustee for the use and benefit of others and that for the purpose of acquiring title by adverse possession the successive possessions of persons claiming as trustees may be tacked, provided some privity of estate or title is shown between them so as to establish a continuity of possession, the contention in this case being that the bishops have held the property in question for the use and benefit of the Roman Catholic Church. It is absolutely necessary, however, whether a paper title or a title by adverse possession is relied on, that there be some privity of title or estate between the successive holders or claimants. In the present case, no privity having been established by descent, devise, conveyance or even parol transfer, the plaintiff must rely upon his remaining contention that the Roman Catholic Bishop is a corporation sole, in which case the title would pass by operation of law from each bishop to his successor in

office whether it is a paper title or a title by adverse possession. It is true that the quitclaim deed to Bishop Gulstan, which is relied on in part, was to him and his "successors in office," but the word "successors," as here used, is a word of limitation and not of purchase. The present bishop could not take under that deed by way of remainder. Nor could the parties to that deed by the mere use of other words of limitation change the devolution of the land from that prescribed by the statute of descent.

Several cases are relied on to show that the Bishop of the Roman Catholic Church in these islands is a corporation sole. The argument is that the common law is now in force here by enactment of the legislature except in certain cases, of which this is not one, and that by the common law a grant to a church was a grant to a parson and his successors in office to hold as a corporation sole for the benefit of the church. One case relied on is that of the *Town of Pawlet v. Clark*, 9 Cr. 292. Not to point out other distinctions between that case and this, it is sufficient to say that the court there held that a parson could take as a corporation sole with right of succession, for the use of the church, only in cases in which the church was licensed or authorized by the crown before the revolution or by the state after the revolution. The court said that "the church entitled, must be a church recognized in law for this particular purpose," and that a mere voluntary society of Episcopalians would not be so entitled. See also *Terrett v. Taylor*, in the same volume at page 43, in which, however, the decision was based partly upon statutes. Of course the conditions in both New Hampshire and Virginia, in which states those cases arose, were very different from what they are here. In those states the common law relating to the erection of churches of the Episcopal persuasion of England, the right to present to such churches and the corporate capacity of their parsons to take in succession, had long been recognized prior to the revolution. Another case relied upon is that of *Brunswick v. Dunning*, 7 Mass. 445, in which the court held that a Congregational minister of a town or parish was a corporation sole for the purpose of holding to

himself and his successors, in right of the town or parish, lands granted for the use of the ministry of the town or parish. But aside from the question of difference between the conditions then existing in Massachusetts and those existing now in Hawaii, that case may be explained by reference to an earlier case, that of *Weston v. Hunt*, 2 Mass. 500, in which it appears that by an early provincial statute, passed in the reign of George II., the ministers of the Protestant churches were made sole corporations capable of taking in succession, and that the provisions of that statute had been re-enacted by a statute of the commonwealth after the revolution. The remaining case relied upon is that of *Santillan v. Moses*, 1 Cal. 92, decided in 1850, in which it was held that a priest of the Catholic church could maintain an action in regard to mission land held previously under Mexican law on the theory that he was more than a mere naked agent and that his charge of the property was coupled with an interest and that his position was more nearly analogous to that of a sole corporation in England. This, so far as we are aware, is the only case that has gone to this extent. It was not based on the common law; the conditions under which it was decided differed greatly from the conditions here; and the view elsewhere generally seems to be that under conditions more nearly like those existing here bishops and priests of the Catholic church, as well as officers of other churches, are not sole corporations. Ordinarily in the United States ecclesiastical corporations, whether aggregate or sole, are created in pursuance of statutes and are regarded, like other corporations, as civil corporations and not as ecclesiastical corporations in the English sense. Bishops of the Roman Catholic Church seem to have been made corporations sole in some states by statute. See *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill. 148, and *McCloskey v. Doherty*, 97 Ky. 300; 30 S. W. 649. In the latter case it does not appear clearly how far the statute went, but it is stated that the name of the corporation, which was the Roman Catholic Bishop of Louisville, had been changed by statute. In *Archbishop v. Shipman*, 79 Cal. 228, it was held that "Joseph

S. Alemany, Roman Catholic Archbishop of San Francisco" was a corporation sole, though whether by statute or not does not appear, but it was held that his successor could not recover land conveyed to "J. S. Alemany," that is, in his individual name, although it was purchased and improved by him as such archbishop with church funds and had been used solely for church and school purposes. As a rule bishops are not corporations except by statutory provision and the devolution of property from one bishop to his successor is usually effected by devise. *Baxter v. McDonnell*, 155 N. Y. 83.

It does not appear that the Bishop of the Roman Catholic Church in Hawaii has ever been created a corporation or even recognized as such by statute or judicial decision. Chapter 67 of the laws of 1886, in which a quitclaim of a piece of land that had been used by the Catholic church since 1839, was made and authorized to be made to the predecessor of Bishop Gulstan, seems to have been framed on the supposition that the bishop was not a corporation. Section 1 quitclaimed the land to "Hermann Kockemann, Bishop of Olba and Vicar Apostolic of the Hawaiian Islands, * * * in trust for the Catholic Mission of the Hawaiian Islands." Section 2 authorized the minister of the interior to execute a quitclaim deed of the land to "Hermann Kockemann in trust for the Catholic Mission of the Hawaiian Islands." There is no more reason here why the Bishop of a Roman Catholic church should be held a corporation sole as matter of law than there is why the bishop or pastor or other officer at the head of any other church should be so held. It has, we believe, been the usual practice for ecclesiastical bodies, desiring corporate powers, to incorporate under the provisions of the statute. This was done by the "Anglican Church in Hawaii." *May v. Willis*, 8 Haw. 178. See also *Pehu v. Kauai*, 3 Haw. 50, for an example of a Congregational church so incorporated. The general corporation law seems to imply, as far as it goes, that corporations of the character now in question should be created, if at all, under the provisions of the stat-

ute. See C. L. Sec. 2025, for the chartering of corporations "either aggregate or sole, ecclesiastical or lay."

No evidence having been introduced or offered and erroneously rejected tending to show privity of title between the present plaintiff and his predecessor, and the bishop not being capable, as we hold, of taking by succession as matter of law on the theory that he is a sole corporation, the order of nonsuit must be sustained. If there is any such evidence, as, for example, of a devise or a conveyance, which would show that the present bishop is the former bishop's successor in title in respect to this land, as well as his successor in office, the plaintiff will have to introduce it in some other action or proceeding.

The exceptions are overruled.

Antonio Perry and T. McCants Stewart for plaintiff.

W. T. Rawlins and Thompson & Clemons for defendant.

LO TOON, ALIAS LO CHOON, PLAINTIFF IN ERROR,
v. THE TERRITORY OF HAWAII, DEFENDANT
IN ERROR.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED DECEMBER 5, 1904. DECIDED DECEMBER 27, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

WRIT OF ERROR.

An exception taken during the trial is not necessary in order to support a writ of error.

ASSAULT—*with intent to murder.*

On a charge of an assault with intent to murder the intent is an essential ingredient. It must be proved as is any other fact.

It may be proved by circumstantial evidence. The jury may infer intent from the manner of the accused in committing the assault, the nature of the weapon used and of the wound inflicted, the absence of provocation or excuse, and the motive, if a criminal motive is shown.

INTERPRETER.

An objection to the competency of an interpreter or to the correctness of his interpretation does not raise a question of law.

EVIDENCE—*rebuttal*.

The admission of evidence in rebuttal which might have been offered in chief is within the discretion of the trial court. Evidence to disprove an alibi may be received in rebuttal, although it tends to support the testimony in chief of the prosecution.

OPINION OF THE COURT BY HATCH, J.

This is a writ of error to the circuit court of the fourth circuit. The plaintiff in error was convicted at the November term, 1903, of the circuit court of the fourth judicial circuit of an assault with a dangerous weapon with intent to commit murder upon one Anama. Three assignments of error are here relied upon. As stated in the brief of the plaintiff in error they are as follows: First, no intent to commit murder was shown by the evidence. Second, mistakes in interpretation from Chinese to English were allowed to go to the jury uncorrected over defendant's objections. Third, evidence tending to prove the defendant was near the place where the offense was committed was introduced by the prosecution on rebuttal over the defendant's objections. The testimony shows that Anama was sitting in his kitchen talking with his wife on the evening of the third day of October, 1903; that about six o'clock or later the plaintiff in error suddenly entered the kitchen, swiftly approached Anama, seized him by the shoulder, held a pistol near his head and discharged it and then rapidly left the apartment. It was shown that criminal relations had existed between the accused and the wife of Anama; that she had recently put an end to these relations and had forbidden the accused to approach her. The defense was an alibi. In rebuttal of the alibi the prosecu-

tion offered testimony tending to show that the accused was seen near the scene of the assault not long before it took place.

The first assignment of error relied upon is that no intent to commit murder was shown by the evidence. A preliminary objection is made on behalf of the defendant in error that the errors assigned cannot be raised for the first time in this court, no exception having been taken at the trial. This was not necessary. This point was settled in *Cummings v. Iaukea*, 10 Haw. 1. The question presented by this assignment is whether any evidence appears in the record which would support the conviction. We are prohibited from considering the weight of the evidence or any question depending upon the credibility of witnesses. C. L., Sec. 1447. Whether there was any evidence at all, however, is a question of law. *Cox v. Drake*, 46 N. J. L. 167. The intent to commit murder, as is contended by the plaintiff in error, was an essential ingredient of the offense charged and to support the conviction must have been found by the jury as a fact. It is well settled, however, that the intent need not have been shown by direct proof. What is passing in the human mind is rarely to be proved by direct evidence. The law does not require impossibilities. Even if declarations are made by the accused at the time of the commission of an offense, they do not furnish infallible proof of the intent. The intent of a defendant, when it is essential to be shown, is better proved by evidence of his acts than of his declarations. *Henderson v. People*, 124 Ill. 607. Nor need the intent be shown by direct and positive testimony, as it may be inferred from circumstances. *Com. v. People*, 116 Ill. 458. "Specific proof of intent is not essential, but the intent may be proved by evidence of the attending facts and circumstances. * * * The jury were justified in taking into consideration the character and manner of the assault; that it was made deliberately with a weapon capable of producing death." *Weaver v. People*, 132 Ill. 536. The intent may be inferred from the nature of the weapon. *Doolittle v. State*, 93 Ind. 272. "The intent with which the act was done is a question of fact either to be shown by the declarations of the

party or to be inferred from the character, manner and circumstances of the assault. * * * Intent is a matter of fact and cannot be implied as a matter of law, but it may be inferred from the use of a weapon or instrument calculated to produce death, or from an act of violence from which ordinarily in the usual course of things death or great bodily harm may result." *Crosby v. People*, 137 Ill. 337. "The intent to kill must undoubtedly be established as an inference of fact to the satisfaction of the jury, but they will draw that inference as they draw all other inferences from any fact in evidence which to their minds fairly proves its existence. Intentions can only be proved by acts as juries cannot look into the breast of the criminal. And where any act is knowingly committed which naturally and usually leads to certain consequences, a jury certainly has the right, in the exercise of ordinary sagacity, to draw the inference that such results are intended." *People v. Scott*, 6 Mich. 287, 295. The cases relied upon by the plaintiff in error do not controvert this position. In *Roberts v. People*, 19 Mich. 401, chiefly relied upon by the plaintiff in error, the question was as to the instructions given to the jury. It was held that the jury should not have been told that if they should find the defendant made the assault alleged, in the manner and with the instrument charged in the information, the law inferred the intent charged, and they were at liberty to find the defendant guilty, whether they were satisfied of the intent or not as a matter of fact; but the court also distinctly held as follows: "By saying, however, that the specific intent to murder * * * must be proved, we do not intend to say it must be proved by direct, positive or independent evidence. * * * The jury may draw the inference as they draw all other inferences from any facts in evidence which to their minds fairly prove its existence; and in considering the question they may and should take into consideration the nature of the defendant's acts constituting the assault, the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce

death, his conduct and declarations prior to, at the time and after the assault and all the other circumstances calculated to throw light upon the intention with which the assault was made." In *People v. Mize*, 80 Cal. 41, the question arose over instructions which tended to take from the jury the question of intent. The case did not hold that the intent could not be inferred from the facts, but that the jury should not be instructed in such manner as to take from them the right to pass upon the question of intent. *People v. Landman*, 103 Cal. 577, turned also upon the construction of the charge of the court, the charge being held to have trenched upon the province of the jury in passing upon matters of fact. In *People v. Sweeney*, 55 Mich. 586, the holding was that the presumption that a sane man must be held to intend the necessary and probable consequences of his own acts, though a very important circumstance in making the proof of intent is not conclusive nor alone sufficient and should be supplemented by other testimony to avoid a reasonable doubt. In the present case no exception was taken to the charge of the court. It nowhere appears that the jury were instructed to give any weight to the presumption above stated. In our opinion there was sufficient evidence, irrespective of the presumption, to support a finding of intent to murder. In light of the authorities above cited the jury were justified in finding the intent from the circumstances surrounding the assault; the manner of the accused; his swift approach; his seizing Anama by the shoulder; his deliberation in placing the pistol near Anama's head and discharging it; the nature of the weapon used and the nature of the wound inflicted; the manner and conduct of the accused in making the assault; the absence of provocation or excuse and the impossibility that the assault, under the circumstances shown by the evidence, could have been accidental. In addition to these circumstances, all of which are matters of fact and entirely distinct from a presumption of law, was the motive resulting from the illicit relations between the accused and the wife of Anama; although an obvious distinction exists between motive and intent, motive being of no conse-

quence where intent is clearly shown, and a good motive being no excuse for a criminal act; yet where a criminal motive is clearly established it may be considered as evidence of intent (*People v. Lane*, 100 Cal. 379, 388), and, in cases depending upon circumstantial evidence, motive often becomes not only material but controlling. *People v. Fitzgerald*, 156 N. Y. 253, 258. We hold that no error has been shown on this assignment.

The second assignment of error as above quoted is as the same is stated in the brief of the plaintiff in error. In the assignment of errors the error is stated as follows: "V. That the trial court erred in ruling as follows during the cross-examination of Fong Ting, (p. 49 of evidence). Mr. Smith: Now if the court please, I have listened to what has been given by the interpreter for some time and two parties have come to me and said there were misinterpretations. I suppose they are misinterpretations. 'I came from supper at half past five.' The interpreter put it to the jury, 'I came from work at half past five.' If it were an immaterial matter I would not make any objection, but as it is material I must object to the interpretations that have been given. Argument by counsel. The court questions the interpreter. The court: Proceed." This presents no question of law. The assignment shows merely an objection by counsel. No exception appears to have been taken to the ruling of the court, nor was any effort made to show by testimony that the interpretation was wrong. As the matter stood the question of the competency of the interpreter was a question of fact. The finding, even if a proper foundation were laid, could not be reviewed on error. Competency of a juror, even, cannot be examined on a writ of error on the ground that the question is one of fact only. *In re Buchanan*, 158 U. S. 31. As to the oath of the interpreter, no sufficient showing has been made to overcome the presumption that he was sworn before entering upon the discharge of his duty. *Com. v. Kane*, 108 Mass. 423; *Nofire v. U. S.*, 164 U. S. 657.

The third ground of error relied upon arises on the sixth, seventh and eighth assignments. The plaintiff in error con-

tends that evidence tending to prove that defendant was near the place where the offense was committed is improper rebuttal. The defense was an alibi. It was fully competent for the prosecution, upon this defense being set up, to offer evidence tending to destroy the alibi. The fact that such evidence incidentally supported the case of the prosecution does not render it inadmissible. When evidence has been given on behalf of a prisoner to prove an alibi the prosecution is entitled to offer rebutting evidence to prove his presence. *State v. Lewis*, 69 Mo. 92; *State v. Maher*, 74 Ia. 77; *Com. v. Moulton*, 70 Mass. 39. Testimony which tends to weaken the evidence for the defense is not objectionable in rebuttal because it also tends to strengthen the evidence of the state. *State v. Magoon*, 50 Vt. 333. The whole matter, however, of the admission of evidence in rebuttal, which might have been offered in chief, was within the discretion of the trial court and cannot be reviewed on error. *Goldsby v. U. S.*, 160 U. S. 70; *Simmons v. People*, 150 Ill. 66; *Com. v. Bell*, 166 Pa. St. 405.

We find no error in the record. The writ of error is dismissed.

Thayer & Hemmenway for plaintiff in error.

W. S. Fleming, assistant attorney general, for defendant in error.

TERRITORY OF HAWAII *v.* EDWARD V. RICH-
ARDSON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED DECEMBER 8, 1904. DECIDED DECEMBER 31, 1904.

FREAR, C.J., HARTWELL AND HATCH, JJ.

INDICTMENT OF OFFICER FOR EMBEZZLEMENT—*averment of appointment.*

In an indictment of an officer for embezzlement, it is not necessary to set forth particularly in what manner or by whom he was appointed.

Id.—*duplicity.*

Under a statute relating to embezzlement by officers and others who are charged by "law, regulation or appointment" with the safe-keeping, transfer or disbursement of money, it is not duplicitous to aver in an indictment that the officer was so charged by "law, regulation and appointment" instead of by only one of these methods, they not being inconsistent methods.

Id.—*what officers liable.*

Under such a statute, an inferior officer or clerk whose office or appointment is recognized by statute only in the appropriation bill, is within the statute if he is charged with the safe-keeping, etc., of money by regulation or appointment; he need not be charged by law.

Id.—*regulation or appointment not inconsistent with law.*

A clerk of the waterworks may be charged by regulation or appointment with the safe-keeping, transfer or disbursement of money although the superintendent of waterworks is charged by law with the duty to "collect all water rates from ships and persons in Honolulu or its vicinity."

OPINION OF THE COURT BY FREAR, C.J.

This case comes up, by special allowance of the trial judge before the final disposition of the case in the circuit court, on an exception to the overruling of a demurrer to an indictment for embezzlement. The demurrer is based on the grounds that the indictment (1) charges no offense under the laws (2) is duplicitous, and (3) vague and uncertain.

We will assume, as contended by the defendant, that the indictment is founded on Act 60 of the laws of 1903 and that it cannot be regarded as founded on section 158 of the Penal Laws, as amended by Act 10 of the laws of 1903. Act 60 provides "that any officer or other person who, by any law, regulation or appointment, now or shall hereafter be charged with the safe-keeping, transfer or disbursement of any money, note or other effects or property belonging to the Territory of Hawaii," etc., "shall be deemed guilty of embezzlement," etc. The indictment charges the defendant as "a person employed in the Department of Public Works of the said Territory of Hawaii, to wit: clerk of the Honolulu Waterworks," and "by law, regulation and appointment, charged, as such clerk of the Honolulu Waterworks, with the safe-keeping, transfer and disbursement of money, notes, effects and property belonging to the said Territory of Hawaii," etc.

The grounds of the demurrer will be considered by the court, as they were by counsel, in their inverse order.

1. The arguments in support of the second and third grounds seem to overlap to some extent. In so far as the third ground need be considered separately from the second ground, the contention is that the indictment should have alleged when and how the defendant was appointed and the authority for his appointment, and the only case cited in support of this contention is that of *State v. Flint*, 62 Mo. 393, in which the court, after discussing an indictment for embezzlement at some length, added: "We think it was objectionable also on account of its defective allegations of agency. It merely stated that the

defendant was the agent of the state and county. It should have alleged when and how he was appointed and the authority for his appointment." This brief statement of the Missouri court seems to be in conflict with the great majority of decisions as well as with the forms of indictments set forth in the books. See *State v. Goss*, 69 Me. 22, and cases cited in 7 Enc. Pl. & Pr. 421; 18 Cent. Dig., 703. The form in the present case is similar in this respect to the form in *Territory v. Wright*, *ante*, 123.

2. In support of the second ground of demurrer it is contended that the indictment is duplicitous in that it avers that the defendant was charged with the safe-keeping, etc., "by law, regulation and appointment," and that it should, in order to stand, have averred that he was so charged by one of these methods only. There is no doubt that an indictment cannot properly charge two or more distinct offenses in the same count, and it is improper to charge two or more inconsistent matters, each of which might constitute an essential part of the offense. For instance, in *State v. Flint*, *supra*, an indictment for embezzlement was held bad because it charged a conversion of money both by way of investment in property and by way of secreting the money—which were held to be inconsistent methods of conversion. In *Larison v. State*, 49 N. J. L. 256, an indictment which charged that the defendant did send and convey an insulting and annoying letter and communication was held bad because sending and conveying were inconsistent, but there was no inconsistency between insulting and annoying or between letter and communication. If there is no inconsistency in the matters alleged, there is no reason why they may not all be alleged—in the conjunctive, of course, if they are set forth in the statute in the disjunctive. We see no inconsistency between law, regulation and appointment. If the defendant could be charged in one of these ways, he could also be charged in any two or all of them. If he is charged by law, he may be further charged by regulation or appointment, even though such regulation or appointment might be unnecessary and add nothing to

the law; they would not be inconsistent with the law. See 10 Enc. Pl. & Pr. 536 *et seq.*

3. It is argued in support of the third ground of the demurrer that the defendant being merely an inferior clerk or employee, whose appointment and duties are not prescribed by statute, is not an officer or other person charged with the safe-keeping, transfer or disbursement of money, within the meaning of the statute under which he was indicted, and further, that he could not be so charged with the safe-keeping, etc., of money by regulation or appointment as distinguished from law for the reason that the statute expressly so charges the superintendent of waterworks and that any regulation or appointment inconsistent with the statute would be void. The Territory, on the other hand, contends that these questions are settled adversely to the defendant by the decision in the *Wright* case, cited *supra*. That decision (pages 128-132) contains much that bears upon these questions although it cannot be regarded as an adjudication of all of them. It does decide at least that the defendant in the present case is an officer or employee of the Territory and not merely of the superintendent; in that case, as in this, the statute under which the indictment was found related to officers or other persons, and the office of the defendant was recognized by statute only in the appropriation bill, as is the case with this defendant. But in that case the statute related to officers or other persons who were "entrusted with, or had the possession," etc., of property, etc., and was not confined, as is the statute now in question, to officers or persons who are "charged with" the safe-keeping, transfer or disbursement of money, etc. And yet the court in that case apparently were of the opinion that a charge or authority to safe-keep, transfer or disburse public money might be by regulation or appointment as well as by law. On page 132 the court used the following language, referring to the provision in the Audit Act that, "all persons who, by any law, regulation or appointment are now, or shall hereafter, be charged with the duty of collecting or receiv-

ing revenue or other moneys on account of the Hawaiian Government, or with the duty of disbursing moneys," etc.:

"There is no requirement of statute that the appointment to receive public money shall be explicitly provided for or authorized by statute. The use in the section of the act above quoted of the words 'by any law, regulation or appointment,' implies that the regulation or appointment is something distinct from an appointment authorized by statute. The evidence that the superintendent placed the defendant in charge of the public money in the office is equivalent to appointing him to do so."

In our opinion the defendant could be charged by regulation or appointment as well as by law with the safe-keeping, transfer or disbursement of moneys. The cases cited by defendant, among which may be mentioned *State v. Meyers*, 56 Oh. St. 340; *Moore v. State*, 53 Neb. 831; *U. S. v. Smith*, 124 U. S. 525, are not in conflict with this view. In none of the statutes construed in those cases were the words "regulation" or "appointment" used. In each of those cases the question was whether the officer indicted was one who was charged by law with the safe-keeping, etc., of money. If, as we hold, an officer may be so charged by regulation or appointment as well as by law, the present case is clearly distinguishable from the cases relied on by the defendant.

Nor do we think that the statute which prescribes the duties of the superintendent of waterworks would prevent the clerk of the waterworks from being charged by regulation or appointment with the safe-keeping, transfer or disbursement of moneys. The section referred to, C. L. Sec. 515, provides for the appointment of the superintendent of waterworks "whose duty it shall be to keep the conduits or pipes for the conveyance of water in repair; collect all water rates from ships and persons in Honolulu, or its vicinity, and perform such other duties in connection therewith" as the superintendent of public works may prescribe. It does not follow that because the superintendent of waterworks is to "collect" all water rates from ships or persons in Honolulu or its vicinity, the clerk of the waterworks could not be charged with the "safe-keeping," transfer or disbursement

of money so collected for such purposes or from such persons, not to mention other money, even if he could not be so charged, within the meaning of the statute, with the duty to "collect" water rates by way of assisting the superintendent of water-works, the latter being responsible for such collection.

The exception is overruled and the case is remanded to the circuit court for further proceedings.

E. C. Peters, Deputy Attorney General, for the Territory.

Robertson & Wilder for defendant.

THE TERRITORY OF HAWAII v. L. B. KERR.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED DECEMBER 7, 1904.

DECIDED JANUARY 7, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE ROBINSON IN

PLACE OF HATCH, J.

LITORAL PROPRIETOR—*boundary "along the sea"—no right to construct a concrete wall and build a residence on the shore between high and low water.*

The defendant whose lot, as shown by its land commission award, is bounded "along the sea" constructed a concrete wall on the shore in front of his lot between high and low water, a corner of the wall projecting a few feet beyond low water, and was filling the space enclosed by the wall with coral and sand so as to raise the surface above the low water line, with the intention of making a house lot for a seaside residence. Held: Following *Gay v. Halstead*, 7 Haw. 587 (1889), that the defendant's land extended to and along the line of high water.

Id., PURPRESTURE—*remedy—irreparable damage—Territory as plaintiff.*

The defendant's concrete wall is a purpresture, encroaching

upon public territory and rights in the shore. A bill for injunction requiring the removal of the obstruction caused by the wall and enjoining its renewal can be maintained by the Territory under the provisions of section 91 of the Organic Act, giving it the possession, control, maintenance and care of all public property ceded to the United States by the Republic of Hawaii. The bill sufficiently avers irreparable damage.

OPINION OF THE COURT BY HARTWELL, J.

This was a bill in equity brought by the Territory to restrain the defendant from proceeding with the erection of a seaside residence immediately in front of a lot owned by him at Waikiki on the island of Oahu, and to require him to remove a concrete wall made there, which he was filling in with coral and sand, above which the residence was to be erected, and to restrain him from further construction or filling in. The following are the averments in the bill:

"I. That L. B. Kerr, defendant, is in possession of and claims to own in fee simple a certain piece or parcel of land in Waikiki, island of Oahu, described in Land Commission Award No. 10677, being apana 2 thereof, a copy of which land commission award is hereto attached and made a part hereof, marked Exhibit A. That out of the said land described as apana 2 in said award a portion of said land was conveyed to the Territory of Hawaii by deed of D. Kawananakoa and J. Kalaniana'ole dated the 30th day of August, 1902, and recorded in the office of the registrar of conveyances in Honolulu in book 241 at page 450, said lot being described therein as the first lot conveyed by the said deed and more fully described in Exhibit B attached hereto and made a part hereof.

"II. That makai, or seaward of the makai line of said lot above described the sea frontage on said lot has been extended by gradual accretion of sea sand to such an extent that the original (present?) high water mark is makai or seaward of the present makai line of the Waikiki road as laid out and crossing the frontage of the said Land Commission Award 10677, apana 2.

"III. That there is an easement in the public for a right of way for a public road across the accretions to the said lot between the old mauka or landward line of the Waikiki road,

said line being the original makai or seaward boundary of the lot above described and the old seaward or makai side of the Waikiki road.

"IV. That the said lot has acquired by accretion a portion of land seaward or makai of the makai line of the present Waikiki road in front of the said lot and running to ordinary high water mark. That the land so acquired is described in Exhibit D hereto attached and made a part hereof.

"V. That the title to the land seaward or makai and in front and adjoining the above described land as set forth in Exhibit C, (the water lot occupied by defendant) and also the lot within the lot described in Exhibit C described in Exhibit E, (being that portion of the enclosure below low water mark, and for one marine league to sea from low water mark) is and was at all times herein mentioned in the United States of America as successor to the Republic of Hawaii, and Kingdom of Hawaii its predecessor, subject to be maintained, managed and cared for by the Territory of Hawaii, until otherwise provided for by Congress or taken for the uses and purposes of the United States by the direction of the President or of the Governor of Hawaii. That the right to the possession, control, management, use, income and benefit of the said lands owned by the United States of America is in the Territory of Hawaii, except such portion thereof, as may be taken for the uses and purposes of the United States by the direction of the President or of the Governor of the Territory of Hawaii, subject however, to the riparian rights of the owner of the said frontage to have access to navigable waters in front of his said lot.

"VI. That the lands above described have not been taken for the uses and purposes of the United States either by direction of the President or of the Governor of the Territory of Hawaii nor at all. And that the right to the possession, use, control and management of the said lands is in the Territory of Hawaii, subject to certain public fishing rights and of taking stone from rocks and of the rights of riparian owners therein.

"VII. That on or about the 19th day of February, 1903, defendant began the construction in front of his said premises described in Exhibit A of a concrete wall 110 feet long more or less, about two feet thick and about five feet high, extending in a direction approximately parallel to high water mark, which said wall is on ordinary low water mark on the northerly or Honolulu end of said wall and about 39 feet seaward of ordi-

nary high water mark and about 46.6 feet seaward from the ordinary high water mark on the southerly or Diamond Head end of the said wall and that the said L. B. Kerr or his agents have completed the said wall and a wall running from the Honolulu end of said wall to and beyond high water mark and along the northerly line of his said lot of like material and of about the same level and said Kerr is now constructing another and similar wall from the Diamond Head side of said wall to and beyond high water mark and along the southerly line of said lot and the said L. B. Kerr or his agents are now filling in the space between the said wall and high water mark with coral and sand so as to raise the surface above the low water line. That the said wall and the said filling in is not within the lines of the property or accretions thereon belonging to and described in the said Land Commission Award 10677. That said structure as plaintiff is informed and believes is not erected as a quay or mole for the purposes of aiding or assisting the owner in using the said premises for the purposes of navigation or fishery, but that said owner intends to use said premises for purposes other than those connected with such use of his lot, to wit, as a house lot for a seaside residence.

"VIII. That the said wall and the filling in and the wall now constructed are so constructed without right upon the property belonging to the United States and contrary to the rights of the plaintiff herein. That the defendant as your petitioner is informed and believes and therefore alleges, claims the right to so construct the wall as aforesaid and to add thereto additional walls as above described and to fill in the land as aforesaid to the level of the said walls to the height as aforesaid and will complete the said walls and the filling in of said land and is now filling in said land, unless restrained by a physical force or by injunction from this court.

"IX. That the construction already completed does and structures in process of completion and threatened to be erected will interfere with the rights of fisheries and of navigation by fishermen within the limits aforesaid and of the right of passing between high and low water mark common to the public. And that the structures do and will interfere with navigation of canoes within the limits and below high water mark and that said work, if allowed to remain or if allowed to be completed as planned, will work irreparable damage to the rights and interests of the Territory of Hawaii. That the plaintiff has no ade-

quate remedy at common law and can have relief or protection only in a court of equity where matters of this nature are properly cognizable."

The defendant demurred to the bill upon ten grounds. His brief summarizes those grounds on which he relies as follows: "1. That the United States should be a party to the bill and that the Territory cannot sue alone. 2. That the suit involves questions of title to real estate which a court of equity should not take up. 3. That the defendant is not shown to have exceeded his rights in building the wall in question. 4. That the bill does not disclose a case of irreparable injury or that the wall is a nuisance." The circuit judge sustained the demurrer on the ground that if "the defendant's title to said lot extends only to high water mark, still it must be admitted that he possesses the rights of a littoral or riparian proprietor whose land is bounded by navigable water; and among those rights, which the law regards as property and of which one cannot be deprived without just compensation, are access to such navigable water from the front of his lot, the right to make a landing, embankment, wall, bulkhead, wharf or pier for his own use or for the use of the public, subject to the public right of navigation. * * * These rights, if they exist, must and can only exist by reason of the ownership of the upland, not in the ownership of the 'shore,' because title to the shore is in the sovereign or state. The existence and assertion, or claim to these rights, does not necessarily dispute the title of the state in and to the soil on the shore. * * * The fact that these rights of the land owner are property and have value, being appurtenant to his land and a part thereof, must not be overlooked. The owner certainly has the right to make all reasonable and proper use of such rights, and all presumptions should be construed in his favor until the contrary is made to clearly appear;" and finally, concluding the examination of the law on the subject, and while holding that "as a matter of law there can be no disposition made of tide lands in these islands until the Territory has been duly admitted as one of the sovereign states of the American

union," the judge ruled that "in the meantime, however, the owner of land fronting upon the seashore may enjoy his litoral rights which are appurtenant to his land so long as he does not interfere with public rights of navigation." On the ground that "the defendant in the erection of the structure in question was and is within his rights, that said structure is not a nuisance, and that it does not interfere with the public rights of fisheries or navigation," the judge sustained the demurrer.

It appears by the averments in the bill that the defendant's concrete wall in the front of his seaside lot is in the space between high and low water marks with the exception of one corner, which projects a few feet over low water mark. The plaintiff's attorney in argument, as well as in his brief, said that "for the purposes of argument it will be assumed that respondent owns to low water mark, whatever the interpretation of this language means," doing this, as he says, because he considers that the question of ownership in that space "is not vital to the issue in this case;" but inasmuch as the averments in the bill are that the title in that shore frontage is in the United States, (as shown by the description contained in the exhibit), the law of the case must be decided accordingly. The sea boundary of the defendant's land is described in the land commission award on which his title is based as running "ma kahakai," which in *Gay v. Halstead*, 7 Haw. 587 (1889), was held to mean "along the high water mark." That decision accords with the doctrine of the United States Supreme Court. "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted enures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained

or granted out to individuals by the United States." *Hardin v. Jordan*, 140 U. S. 381.

The defendant ably argued that the common law secured shore rights to proprietors holding grants upon the shore until the "insidious Digges" and the needs of the royal purse secured for Charles I. judicial decisions which "in theory" nullified such rights; a modification of the law which, the defendant claims, has not been adopted in the states and is not in harmony with justice or public interests. The argument is interesting as a historical study, but under the decision in *Gay v. Halstead* the defendant's claim of ownership of the shore is not open for discussion. When land grants include the shore, whether by custom, prescription or express terms, the ownership is subject to the *jus publicum*, including the right of public use for purposes of navigation and fishery. Such limitations of ownership do not apply to cases where there is no grant of the shore express or implied, and no prescriptive claim thereto. "Maintenance of structures in the waters in the absence of public grant is by sufferance and not by right." 1 Farnham on Waters, 209, citing *Walsh v. Hopkins*, 22 R. I. 418, which sustains the text. The immunity with which litoral proprietors whose grants are bounded by the shore may construct and maintain below high water mark wharves, landings and piers not interfering with or obstructing navigation, rights of way or of fishing may be termed a right incident to such proprietorship or otherwise designated; but to erect wharves, landings and piers on the shore when the shore is owned by the United States cannot be regarded from the point of view of the public interests as the same with the erection of residences. The former allow access to boats, although they may otherwise impede or block the public right of way over that part of the beach on which they rest. Access to them may be obtainable elsewhere than from the shore lots of the proprietor who erects them. The defendant's structure when completed by filling in the wall would raise the space to a level above high water mark. The entire shore could thus be appropriated by coterminous owners. Purpresture is defined

by Worcester as "any encroachment upon or enclosure of that which should be common or public, as upon highways, rivers, harbors, ports, etc." Obstruction is defined as "that which obstructs or impedes, obstacle, impediment, hinderance."

"Where there is a house erected or enclosure made upon any part of the king's demesnes, or of a highway or common street, or public water, or such like public things, it is properly called a purpresture." 4 Bl. Comm., 167. Coke defines purpresture as "a close, or enclosure, that is, when one encroaches, or makes that several to himself, which ought to be common to many." 2 Inst. 38, 272. In *King v. Russell et al.*, 6 B. & C. 566, the defendants were acquitted upon an indictment for a nuisance in the river Tyne in having erected upon the said river ten geers (consisting of piles driven into the bed of the river on the bed of which a platform and railway were laid), "by means whereof, the navigation, course, stream, and passage of, in, through, along, and upon the said river, and the king's ancient, common, and public highway thereon, etc., and from thence continually up to that time had been and still were greatly straitened, narrowed, lessened, obstructed, and blocked up." The court instructed the jury that "the use of a navigable river was not for passage only, but for other important rights which might supersede the right of passage. That when a great public benefit accrued from that which occasioned the abridgment of the right of passage, that abridgment was not a nuisance, but proper and beneficial." On a rule *nisi* for entering a verdict of guilty or for a new trial the defendants cited Lord Hale, who says: "It is not every building below the high water mark, nor every building below the low water mark, that is *ipso facto* in law a nuisance, for that would destroy all the quays that are in all the ports of England, for they are all built below the high water mark, for otherwise vessels could not come at them to unload; and some are built below the low water; and it would be impossible for the king to license the building of a new wharf or quay, whereof there are a thousand instances, if *ipso facto* it were a common nuisance; for the king cannot license a com-

mon nuisance. Nay, in many cases it is an advantage to a port to keep in the sea water from diffusing at large; and the waters may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the king's, the building below the high water mark is a purpresture, an incroachment, an intrusion on the king's soil, which he may either demolish, or seize, or arent at his pleasure; but it is not *ipso facto* a common nuisance, unless, indeed, it be a damage to the port and navigation. In the case therefore, of a building within the extent of a port, in or near the water, whether it be a nuisance or not is *quaestio facti*, and to be determined by a jury, on evidence, and not *quaestio juris*." The defense claimed that if in *Rex v. Grosvenor*, 2 Stark. 511, there had been a shewing of "compensation to the public" an acquittal would have been ordered, although the chief justice charged the jury: "The public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered; * * * although the public were not able to enjoy this benefit, namely, that of a recess in the river, closed up by Lord Grosvenor's embankment, at all times; yet if they could derive benefit from it for the space of two hours each tide, they are entitled to that advantage, unless the want of it be compensated by some superior advantage resulting from the alteration." It was admitted that if this had been "an information for a purpresture, it might have been necessary to the defense to have shewn either a writ of *ad quod damnum* executed in the defendants' favor, and a license thereon from the crown or a patent. * * * But on the trial of an indictment like the present, the writ of *ad quod damnum* is immaterial." Brougham, Tindal, Alderson and Parke appeared for the prosecution, contending: "First, that where a public right is infringed, that cannot legally be done without the sanction of a writ of *ad quod damnum*, and the king's license, although an equivalent be given," referring to *Atty. Gen. v. Brittain*, MSS., an application for an injunction to stop the building of a quay on the river Mersey, in which the chancellor "directed an issue to try whether it

was an injury to the port and harbor of Liverpool; and that it was not his intention to direct any trial as to the question, whether it was an injury to the navigation on the river Mersey, because it was his opinion that the *tide wave of a river in the shallowest part of it could not be interrupted by buildings of that sort, unless there had been an antecedent execution of a writ of ad quod damnum by a jury.*" It was further contended that "the plea of not guilty puts the fact of the obstruction by the defendant, and that only, in issue; and the simple question for the consideration of the jury is, whether the party accused has or has not occasioned the obstruction." The court discharged the rule and thought the verdict ought to stand, pointing out that "the only objection to the geers is, that they are unlawful, as being a public nuisance to the navigation. *The defendants' right to have them there, and to continue and use them, is not impugned on any other ground.*" The following remarks of the court are in point in the present case: "But it is objected that they are at all events illegal, for want of a writ of *ad quod damnum*, and a favorable return of the inquisition thereof;" on which point the court said: "This is not like the case of shutting up a public highway, and setting out another in lieu; that cannot be done so as to do away the former public right, and to create a new public right, without a writ of *ad quod damnum*. The former can only be abrogated by the writ of *ad quod damnum*, and the proceedings, and the king's license thereon; but that is not requisite here, as I conceive, whether the mode of enjoyment in question of some of the public rights of the port, river, and navigation, is or constitutes in fact a public nuisance? If that mode of enjoyment be not, in fact, such a nuisance, it does not, as I conceive, become so for want of the writ of *ad quod damnum*, though, without such a writ, and a favorable inquisition thereon, they who erect or do those works act at their peril; and though the want of such a writ may be a good ground for the lord chancellor's interfering for the security of the public, and by injunction restraining any person from erecting works or buildings that interfere with the exercise of a public

right, till it be ascertained by the writ of *ad quod damnum*, that their so doing is not a public nuisance or injurious to the king or his subjects."

The case shows that in an indictment for a public nuisance from structures in public waters the defendant may show the public gain as an offset to its loss, and yet that those who erect them would "act at their peril" of an information for a purpresture. The contention of the eminent counsel in that case, that the infringement of a public right without regard for countervailing benefits can be restrained in equity has been sustained in later decisions. In *Atty. Gen. v. Terry*, 9 L. R. Ch. App. Cas. 423, the defendant had driven piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of sixty feet available for navigation. The information was based upon two grounds; one, that the structure would be a nuisance in impeding navigation, and the other that "the defendant has no right to erect such structure and ought to be restrained by injunction, quite independently of the fact of there being an actual nuisance or not." In ordering an injunction Sir G. Jessel, M. R., said of the case of *Rex v. Russell*, "In my opinion that case is not law, and it is right to say so in the clearest terms," citing cases which fully sustained him, and further saying, "It is not an answer to say that at this moment the obstruction is not a nuisance. It may become so. * * * It is for that reason so important that a person complaining of the obstruction, though not able to maintain an indictment for nuisance because an actual nuisance has not yet been committed, should be able to come to a court of equity and ask that court to restrain the continuance of that obstruction." The decree was sustained on appeal, James, L. J., concurring and saying, "Where a public body is entrusted with the duty of being conservators of a river, it is their duty to take proceedings for the protection of those who use the river." The defendant relies on *People v. Davidson*, 30 Cal. 379, in which the court says: "It is thought that there is no case in the books in which a court of equity, as such, has ever abated or enjoined a purpresture

simply on the ground that it was one." Of that decision two things are to be said: First, that it was a wharf which was sought to be abated as a nuisance, and as the court said, "Wharves in themselves considered are not of evil consequence, but the reverse;" and secondly, that there are both American and English decisions directly opposed to that case. A similar decision apparently was made in *Atty. Gen. v. Del. R. Co.*, 27 N. J. Eq. 17, which held that a bridge across the Delaware river is not a public nuisance merely because it is unauthorized. On the other hand, the following cases are to the effect that a mere purpresture on public lands may be enjoined in equity. *U. S. v. Ranch Co.*, 25 Fed. 465, (Miller, J.); *U. S. v. Same*, 26 *Ib.* 218, (Brewer, J.), the court saying, "Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction." *U. S. v. Cattle Co.*, 33 *Ib.* 323, the court by Brewer, J., saying, "As the legal title is in the government, the presentation of that title casts upon the defendant the duty of establishing its equities." "Any unauthorized appropriation of public property to private uses amounting to a purpresture or public nuisance, is within the jurisdiction of equity to enjoin." 1 High on Injunc., Sec. 760.

In *People v. Vanderbilt*, 38 Barb. 282, 26 N. Y. 287, and 28 *Ib.* 396, the defendant was engaged in making a pier in New York harbor in the North river, having made a crib which was to be filled with stones and to constitute a part of the pier. Suit was brought to restrain the defendant from proceeding with the erection of the pier and to compel the removal of the part already built "as an encroachment upon the harbor, an obstruction to navigation and therefore a public nuisance." The court (26 *Ib.* 293) distinguished between "the right of property in the soil or bed of a navigable river or arm of the sea and the right to use the waters for purposes of navigation," the first of these rights being vested in the people and capable of alienation to an individual or corporation, and the second being "a right common to the whole people and it is vested in the people at large." The judgment of the supreme court at its

general term (38 Barb. 282), was affirmed, 26 N. Y. 298. The following extracts are from the opinion of the court at the general term: "Without a grant or authority from the sovereign power, every obstruction of a navigable river will be a nuisance, and no evidence need be given of the extent to which the public right is impaired or the public use of the river impeded. It is sufficient that the public domain which is devoted to a public use is invaded in a way to deprive the public of the use of any part of it. In case of a grant or license to erect a dam, pier or dock, or wharf, or other obstruction in a navigable stream, it could not be held a nuisance, without proof of the fact that the public damage and injury resulting from the obstruction greatly exceeded the public benefits of the erection, and perhaps not even upon proof of an entire destruction of *jus publicum*. But any obstruction placed in a public way without right—and a public navigable river stands upon the same footing as a highway—would be a nuisance, and the courts will not inquire whether the advantage arising from the act complained of would compensate for all the injury and inconvenience which the public would suffer from it. * * * Among other remedies for an obstruction of public navigation, courts of equity will grant an injunction to prevent a threatened or attempted obstruction." 38 Barb. 286-7. The court of appeals (28 N. Y. 396) affirmed the judgment of the supreme court, saying: "The crib sunk by the defendant and the proposed pier were a purpresture, and were *per se* a public nuisance. The offer, therefore, of the defendant's counsel to prove, by the testimony of witnesses, that the crib and proposed pier were not and would not be, an actual nuisance, and would not injuriously interfere with or affect the navigation of the river or bay, was properly overruled. The remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the attorney general." "This court has jurisdiction to restrain any purpresture or unauthorized appropriation of the public property to private uses, which may amount to a public nuisance or may injuriously affect or endanger the public inter-

est." *Atty. Gen. v. Cohoes Co.*, 6 Paige 135. The defendant's wall is a purpresture which he can be required to remove and restrained from renewing.

By the provisions of section 91 of the Organic Act the public property ceded to the United States by the Republic of Hawaii "shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. * * * " In performing this duty of maintaining, managing and caring for the public property thus placed in its possession the Territory may properly require the removal of obstructions to public rights upon that portion of the seashore which is outside of high water mark, and this may be done by resorting to a court of equity for relief. The bill sufficiently describes the obstructions placed and intended to be placed by the defendant on the shore (as that portion of the shore which is between high and low water marks may be termed), owned by the United States. "The ground of this jurisdiction, in cases of purpresture, as well as of public nuisance, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They can not only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the public against them in the future." *Missouri v. Illinois*, 180 U. S. 245, 45 L. E. 513. It is not so much the extent of this obstruction or the irreparable injury to the public which it now causes, that requires its removal, as the fact that as far as any obstruction can do so it prevents public use of the shore for passage over it, and that if allowed to go on to completion it would appropriate public territory to private use for no purpose conducive to public interests. Walls and buildings extending seaward beyond high water mark block the right of way and furnish no compensatory advantages to the public for purposes of navigation or fishery.

The decree of the circuit judge sustaining the defendant's demurrer is reversed, the demurrer is overruled and the case is remanded to the circuit judge for such further proceedings as shall be appropriate.

Lorrin Andrews, Attorney General and P. L. Weaver for the Territory.

Kinney, McClanahan & Cooper and S. H. Derby for defendant.

FRANK GODFREY, TRUSTEE FOR THOMAS METCALF, v. HELEN ROWLAND, HING CHUNG, J. F. FRANCIS, KONDO, D. O. HAMMOND, JOSE DO ESPIRITO SANTO, W. O. SMITH, TRUSTEE, AND B. J. GALLAGHER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED OCTOBER 4, 1904. DECIDED JANUARY 16, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

MARRIAGE—*license—ceremony.*

In order to prove a legal marriage it is not necessary to prove that a license to marry was issued. The license will be presumed from the celebration of the marriage. Nor need any ceremony be shown to prove a marriage.

Id.—*license—directory only.*

The provisions of sections 1870 and 1871, Civil Laws, requiring a license to marry to be obtained, are directory only, and a failure to comply with the same does not render a marriage void.

Id.—Id.—*record.*

It is not necessary to show, in order to prove a marriage, that a record of the issuance of a marriage license was kept by the officer who issued the same.

LEGITIMACY—*adultery of mother.*

Evidence of adultery of the mother cannot be received to prove illegitimacy, if the husband and wife were living together at the time when the child was conceived.

PRESUMPTION OF LEGITIMACY—*proof.*

The presumption of legitimacy may be overcome by proof. The proof need not go to the extent of showing the impossibility of legitimacy, neither need it remove every reasonable doubt; it must however be clear, distinct and convincing. A showing of improbability of legitimacy is not sufficient.

PRESUMPTIONS.

The presumption of innocence may be offset by the presumption that relations between a man and woman, illicit in the beginning, continued so until proof of a change of status should be offered.

COMMON LAW—*merger—deed of life tenant.*

A deed of a life tenant, joined in by a remainder man, will not defeat a contingent estate in this jurisdiction. The common law respecting merger not adopted in Hawaii.

OPINION OF THE COURT BY HATCH, J.

This is an action of ejectment, coming here on a bill of exceptions from the circuit court of the first circuit. The plaintiff claims as trustee for Thomas Metcalf one undivided half of certain lands situated on the northwest corner of Beretania and Alapai streets in Honolulu. This land was the property of Theophilus Metcalf, deceased, who devised it to his son Frank for life, with remainder to Frank's children lawfully begotten, if any, with remainder over in case of failure of issue. The life tenant died in the year 1900. The plaintiff contends that he represents the only lawfully begotten child of Frank Metcalf, to wit, Thomas Metcalf, who was living at the date of the death of his father. The legitimacy of Frank Metcalf was in issue, and also the fact of a marriage between Frank's father and mother. The jury returned the following verdict:

"We the jury in the above entitled cause find for the defendants in that the evidence fails to show that a record of the issuance of the marriage license was kept as required by law.

(Sgd.) E. E. MOSSMAN, Foreman.

Honolulu, Oahu, September 30, 1903."

The plaintiff excepted to the verdict and filed a motion for a new trial.

The first exception relied upon by the plaintiff is the exception to the giving of defendants' requested instruction No. 7, being subdivision (a) of plaintiff's exception No. 13.

"(a) In order to find a marriage between Frank and Alice Metcalf, you must find that a license to marry was obtained and a marriage ceremony performed, although the license need not necessarily be produced in court to establish this."

This instruction does not correctly state the law as to the necessity for a ceremony of marriage. It is also faulty on account of its vagueness in respect to the necessity to prove a license to marry. The law in force in Hawaii at the date of the marriage in question was as follows:

Civil Laws, "Sec. 1869. It shall not be lawful for any minister of religion of any sect whatsoever, or any other person, to perform the marriage ceremony within this Kingdom, without first obtaining from the Minister of the Interior a license to celebrate marriage."

"Sec. 1870. In order to make valid the marriage contract, it shall be necessary that the respective parties be not to each other within the fourth degree of consanguinity; that the male at the time of contracting the marriage shall be at least seventeen years of age, and the female at least fourteen years of age; that the man shall not at the time have any lawful wife living and that the woman shall not at the time have a lawful husband living; and it shall in no case be lawful for any person to marry in this Kingdom without a license for that purpose duly obtained from the agent duly appointed to grant licenses to marry."

"Sec. 1871. The marriage rite may be performed and solemnized by any person duly authorized by law, upon presentation to him of a license to marry, as prescribed by the foregoing section; who may be at liberty to receive the price to be stipulated by the parties, or the gratification tendered to him."

There is nowhere to be found in our law a provision requiring a ceremony. The most that can be said is that the statute implies a ceremony. Sec. 1871 is permissive merely. It has not even the force of a directory enactment. Sec. 1870 is man-

datory as to all its provisions except that relating to a license. That provision must be held to be simply directory. By the universal rule of construction applied to statutes regulating marriage, wherever it is possible to do so, the provisions must be held to be directory and not mandatory. They are held mandatory only when accompanied by provisions of nullity; if it is provided that upon the failure to perform certain steps made essential to the validity of a marriage such marriage shall be null and void, the provision is held mandatory, but not otherwise. All of the provisions of section 1870, except that in respect to licenses, are framed in language mandatory in nature. It becomes clear that these were intended as mandatory when the enactments in regard to annulment of a marriage are considered. By section 1920 of the Civil Laws all of the requirements which we have called mandatory in section 1870 are repeated as grounds for declaring a marriage null and void. The failure to obtain a marriage license, as required by section 1870, however, is not made a ground for declaring a marriage void. There being then, no provision of nullity connected with this requirement, it must be held to be directory only; and a failure to comply could not be held to be a ground of nullity, nor to affect the validity of a marriage entered into without it.

In *Meister v. Moore*, 96 U. S. 76, the court says: "Marriage is everywhere regarded as a civil contract. Statutes in many of the states, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle, that, where a statute creates a right and provides a remedy for its enforcement the remedy is exclusive. No doubt, a statute may take away a common law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by

witnesses. Such formal provision may be construed as merely directory instead of being treated as destructive of a common law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage."

In *Parton v. Hervey*, 1 Gray 119, the court says: "But the effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only, upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled. But in the absence of any provision, declaring marriages, not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute."

See also Bishop on Marriage and Divorce, 283. (6 Ed.) Bishop says: "Marriage existed before statutes, it is a natural right, it is favored by the law. Hence, in reason, any commands which a statute may give concerning its solemnization, should, if the form of words will permit, be interpreted as mere directions to the officers of the law and to the parties, not rendering void that which is done in disregard thereof."

In *Republic v. Waipa*, 10 Haw. 442, it was held that it was not necessary to prove that a license to marry had been obtained in order to support a conviction for adultery. The court says: "On the point that the prosecution must prove that a license to marry must be proven, we hold that this is not necessary. 'When the law casts upon an official person a duty connected with his office, and the time for its performance transpires, the *prima facie* presumption is that it is done.' 1 Bishop on Marriage and Divorce, Sec. 450. The presumption holds good until the contrary is shown. It was therefore not necessary to produce the license to marry nor to prove that the agent who granted

it had the requisite authority." The reason for supporting this presumption in a case where the issue is one of inheritance is much stronger than in a case of criminal prosecution for adultery.

In *Cartwright v. McGowan*, 121 Ill. 388, the court lays down this rule: "When the celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, in fact everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed."

The instruction therefore was clearly wrong as to the statement that a ceremony must be proved. It is also wrong in that it allowed the jury to believe that under any circumstances it would be necessary for the plaintiff to offer evidence as to the issuance of a license in presenting his own case. The prejudice resulting to the plaintiff from giving this instruction becomes more apparent when the next two instructions asked by the defendant are considered. These are defendants' requests No. 8 and No. 9. They are as follows:

"8. Under the law as it existed at the time of the alleged marriage of Frank and Alice Metcalf, it was the duty of agents to grant marriage licenses, at the close of each year to transmit a copy of all the licenses granted by them during the year to the board of education, and it then became the duty of such board to preserve the record of such licenses. (Compiled Laws, p. 213.)"

"And I instruct you that where a legal duty is imposed upon an officer or board the presumption arises that such officer or board performs its duty, although this presumption may be overcome by evidence."

"9. Under the law as it existed at the date of said alleged marriage and as it now exists, it was and is the duty of every person authorized to solemnize marriages in this Territory to make and preserve a record of every marriage by him solemnized."

"And I instruct you that where a legal duty is imposed upon a minister the presumption arises that such minister performs his duty, although this presumption may be overcome by evidence."

These instructions introduce into the case matters with which the jury had nothing to do, the consideration of which must have diverted their minds from the real issue. The question for the jury to decide was, did a marriage take place between Frank and Alice Metcalf as claimed by plaintiff. The tendency of the instruction was to produce an impression that in order to prove a valid marriage, the plaintiff must have proved that a license had been issued, that such license was recorded, and that such record was transmitted to the board of education. Legitimacy cannot be made to depend upon the proof or want of proof of the performance by any official of a merely clerical duty. Defendants' counsel protest that these instructions were not intended to convey such an idea. It seems to us, however, clear that this conclusion might have been drawn from them by the jury. The qualification added by the trial judge did not relieve the instructions of their objectionable features,—they should not have been given at all. On the other hand the presumption that a license was issued may be rebutted by proof to the contrary. And evidence that no license was in fact issued, though not of itself sufficient to disprove marriage, may be considered, with other circumstances, as tending to prove that a marriage had not taken place, as claimed.

In consequence of errors in defendants' requests for instructions numbered 7, 8 and 9, the verdict should be set aside and a new trial ordered.

We deem it advisable to express our views upon some of the other questions of law upon which rulings were asked. Counsel for defendants requested the following instructions bearing upon the question of the legitimacy of Thomas Metcalf:

“Defendants' instruction numbered 13.

“Although there is a presumption that a child born in lawful wedlock is legitimate, yet if it is not shown that sexual intercourse actually took place between the husband and wife at a time that the husband might have been the father of the child many circumstances may be relevant to rebut the presumption of legitimacy.”

“Defendants' instruction numbered 14 as modified.

"Among these circumstances are the relative situation of the parties and their habits in life, and reputation in the family, the adultery of the mother, and other facts bearing on the probabilities of the case. However, the law presumes that the husband and wife do have sexual intercourse until the contrary is shown by competent evidence to the satisfaction of the jury that the husband did not have such access to the mother."

"Defendants' instruction numbered 15.

"It is not necessary for the defendant to go so far as to show that there was no possibility of access between Frank and Alice at or near the time of the child's conception in order to make competent proof of the child's illegitimacy."

"Defendants' instruction numbered 16.

"If you find from the evidence that at or near the time of Thomas' conception, if conceived in 1882, his mother was having or had adulterous intercourse with another man, and if you also find that it is improbable that Frank had access to her at such times, I instruct you that these are circumstances to be weighed by you in arriving at a conclusion as to whether Thomas is legitimate or illegitimate."

The above instruction numbered thirteen does not give sufficient weight to the presumption of legitimacy and seems to imply that a person claiming legitimacy must show something more than birth in lawful wedlock. This is not the case; the burden is entirely upon the party contesting the legitimacy to prove to the satisfaction of the jury the fact of the illegitimacy and to overcome the presumption of legitimacy. This, however, can be done by circumstantial evidence.

In *Hawes v. Draeger*, L. R. 23 Ch. Div. 178, the court says: "That the presumption of legitimacy may be rebutted by circumstances inducing a contrary presumption; and that non-access, or non-generating access, may be proved by means of such legal evidence as is admissible in every other case in which a legal fact has to be proved."

Instructions numbered fourteen and sixteen improperly admit a consideration of probabilities. The presumption of legitimacy cannot be destroyed by a mere probability. The proof must be clear, distinct and convincing. It need not go to

the extent of showing the absolute impossibility of legitimacy in order to be strong enough to overcome the presumption. A showing merely that it was improbable that the husband was the father of the child is not sufficient. No child born in lawful wedlock can be decreed a bastard on any showing of circumstances which only create doubt and suspicion. *Shuman v. Shuman*, 83 Wis. 254. A balance of probabilities is not enough. *Morris v. Davis*, 5 Clark & Finley, 265; *Stegall v. Stegall*, 22 Fed. Cases 1230; *Phillips v. Allen*, 2 Allen 453; *Caijole v. Ferrie*, 23 N. Y. 109; *Orthewein v. Thomas*, 127 Ill. 562.

These instructions also improperly allow a consideration of the alleged adultery of the mother.

If the facts show that the husband and wife were living together, evidence as to the adultery of the wife is absolutely inadmissible. The issue is, as to this phase of the case, whether or not the husband had sexual intercourse with the wife. The adultery of the wife has no bearing on this question, and it certainly cannot be used as evidence tending to show that the husband did not in fact have intercourse with the wife.

In *Hopkins v. Chung Wa*, 4 Haw. 650, this court went to the extent of holding that even evidence of the child's admixture of blood is inadmissible to rebut the presumption of legitimacy, and that the adultery of the wife could not be shown, the husband and wife having lived together during a year or more previous to the birth of the child.

"It is established law that every child born in wedlock, when the husband is not shown to be impotent, is presumed to be legitimate, even though the parties are living apart by mutual consent; that this presumption—(as held in modern times) may be rebutted by proof that the husband had no access to his wife during the time when, according to course of nature, he could be the father of the child; but that the presumption cannot be rebutted by proof of the wife's adultery while cohabiting with her husband—the law not allowing the admission of evidence on the question, whether the adulterer or the husband is most likely to be the father of the child." *Hemmenway v. Tawner*, 1 Allen, 209.

Defendants' instruction numbered fifteen is correct. It is not necessary for the defendant to go so far as to show that there was no possibility of access between Frank and Alice at or near the time of the child's conception in order to make competent proof of the child's illegitimacy.

It was once held that the presumption of legitimacy, if the husband by possibility could have had access to the wife, could not be disproved; the early rule being that if the husband was "within the four seas" the child was legitimate and the contrary could not be shown. Later, it was held that if the fact of marriage has been proved, nothing can impugn the legitimacy of the issue short of proof of facts showing it to be impossible that the husband could be the father. *Patterson v. Gaines*, 6 How. 550. The point actually decided in *Patterson v. Gaines*, however, was that a child could not be bastardized by the mere declarations of the father. In *Phillips v. Allen*, 2 Allen 453, it was held that the presumption of legitimacy can only be rebutted by evidence which proves beyond all reasonable doubt that the husband could not have been the father. These cases show a survival of a trace of the old *quatuor maria* idea. We understand the modern rule to be that proof of non-access need not go to the extent of showing the impossibility of the husband being the father; neither is it necessary that the proof should be clear beyond every reasonable doubt. If it is once held that the presumption may be rebutted at all, there seems to be no logical reason why the fact of illegitimacy should be required to be proved in any other manner than is any other fact in a court of justice. This seems to have been the view of the House of Lords in *Morris v. Davies*. On page 244, Lord Cottenham said, "the argument for the appellant assumes as a rule of law, that no evidence is admissible to disprove sexual intercourse having taken place, where the opportunity is proved to have existed, the husband and wife being proved to have been within the same house. This is very like attempting to establish a doctrine of *intra quatuor muros*, instead of the exploded doctrine of *quatuor maria*. But it is admitted that the parties may be followed

within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact. If so the principle does not stand on any positive rule of law, *but upon evidence of the fact as to which the ordinary rules of evidence must be applied.*" And again on page 260 it is said the presumption stands until encountered by such evidence as proved *to the satisfaction of those who are to decide the question* that sexual intercourse did not take place. And on page 261 "that it is the duty of a jury and your Lordships to weigh the evidence against the presumption and to decide according as, in the exercise of free and honest judgment, either may appear to preponderate."

Defendants' request number 11 was as follows:

"If you find from the evidence that Frank and Alice were illicitly cohabiting together before the alleged marriage, I charge you that the presumption arising therefrom is that they continued to cohabit illicitly, and unless you find that such presumption has been overcome by evidence of their marriage, you must find for the defendant."

This instruction is correct. The plaintiff contends that the presumption of continuing illicit relations was overcome by the presumption of innocence, and that the presumption of marriage arising from cohabitation is one of the strongest known to the law, especially in cases involving legitimacy. The first presumption is one easily overcome by evidence of marriage. The second presumption is a presumption which increases in force with the length of time during which the parties live together as husband and wife.

"The presumption of legitimacy is a constant presumption, and is to have weight and influence throughout the investigation, the weight of the presumption increasing with lapse of time." *Shuman v. Shuman*, 83 Wis. 254; *Ingersoll v. McWillie*, 30 S. W. 61.

In the present case Frank and Alice Metcalf lived together as man and wife after the alleged marriage for only three years. This weakens materially the force of the presumption of inno-

cence. Under all the circumstances of the case it appears to us that the presumptions offset each other, which would leave it to the plaintiff to prove affirmatively the marriage upon which he relies, uninfluenced by any presumption one way or the other.

The trial judge erred in excluding the evidence of the issuance of a marriage license offered by the plaintiff in rebuttal. The testimony, though not contradicting any one expression of any of the witnesses produced by the defendant, rebuts the whole theory of the defense and should have been received.

It is urged that notwithstanding any errors appearing in the record the verdict should not be disturbed for the reason that the deed offered in evidence by the defendants (defendants' exhibit 1) from Frank Metcalf to Julia Prosser, Helen Rowland and W. G. Rowland, trustee, dated March 9th, 1875, operated to destroy the contingent estate of any children of Frank Metcalf and that defendant Helen Rowland must have judgment in any event. Frank Metcalf, by the third paragraph of the will of his father Theophilus Metcalf, took a life estate in the land in question, with remainder to his children lawfully begotten should he leave any; otherwise the property was devised to the testator's daughters Helen and Julia should they survive Frank or the survivor of his said daughters. The fourth paragraph of the will shows that life estates only were intended to the daughters, a gift over to their children being made, in case they left any lawfully begotten, and a disposition being made in case of the decease of one of the daughters without children. The contention is that in consequence of the adoption of the common law by the act of 1892 the common law doctrine of merger applies, and the contingent remainder in Frank Metcalf's children was squeezed out and destroyed by the deed of Frank above stated. The common law, except as to certain doctrines specially adopted, was not in force in Hawaii in 1875, the time when the deed in question was made. Nor did its subsequent adoption affect Hawaiian conveyancing. The adoption of the common law was not unqualified. It was excluded when in conflict with the laws, judicial precedents, or usage of Hawaii.

Long before the adoption of the common law a system of conveyancing had grown up in Hawaii by national usage and had become fixed in character. Feoffments and livery of seisin were unknown, as were all of the incidents of the feudal system. The Hawaiian deed was analogous to a bargain and sale deed, and was dependent for its force and effect, until the statute of uses was recognized, upon Hawaiian usage. The statute of uses, however, became law at an early date in Hawaii. As pointed out in *Haw. Trust Co. v. Barton*, decided at the present term, the statute of uses must be held to have been in effect here since 1855. But at common law a merger would not result from a deed of bargain and sale. The distinguishing feature of a common law deed of bargain and sale was that it passed no greater title than the grantor had to convey. In *Dennett v. Dennett*, 40 N. H. 565, the court says: "But it is settled that conveyances which derive their operation from the statute of uses, as a bargain and sale, lease and release, and the like do not bar contingent remainders, for none of them pass any greater estate than the grantor may lawfully convey." No greater effect can be given to a conveyance here. The deed of Frank Metcalf operated upon his life estate only, and did not affect the contingent remainder in any child which he might lawfully have begotten.

It is finally contended that there was not sufficient proof of possession by any of the defendants to support a verdict against them. This was made one of the grounds of a motion by defendants for a directed verdict. The motion was overruled and an exception taken by defendants. There was evidence of possession by the defendant Helen Rowland, but none as to the other defendants. As to the latter the verdict should stand. As to the defendant Helen Rowland the extent of her possession was not made an issue in the case, nor was there any disclaimer by her as to any portion of the land claimed. The jury might have found her possession co-extensive with the title claimed by her. The indefiniteness of the testimony as to the extent of her possession was not such a fundamental defect in the plaintiff's case

as to control any subsequent finding. It is not in its nature conclusive, and should not in our opinion deprive the plaintiff of his right to a reversal of the verdict in consequence of the errors committed on the trial. As to the defendant Helen Rowland the verdict is set aside and a new trial ordered. The case is remanded to the circuit court for the first circuit for further proceedings.

Robertson & Wilder, F. E. Thompson and C. F. Clemons for plaintiff.

Kinney, McClanahan & Cooper for defendants.

MARCONI'S WIRELESS TELEGRAPH COMPANY,
LIMITED, *v.* FREDERICK J. CROSS.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED NOVEMBER 14, 1904. DECIDED JANUARY 16, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF HATCH, J.

NOVATION—*promoter's agreement—his release from liability may be inferred.*

The plaintiff and defendant agreed on introducing in Hawaii the plaintiff's system of wireless telegraphy, the plaintiff to furnish instruments and superintend the installation, the defendant to pay \$11,000 in two equal installments after the system should be in working order and £500 yearly rent for five years. At the time of making the agreement the defendant was told by the plaintiff's representatives that they might make a contract with him, he could assign it to his company, which, as defendant testified "was agreeable and it was done." The company was organized in Hawaii, the defendant assigning to it his rights under the agreement by assignment dated December 5, 1899. The articles of asso-

ciation of the company were filed December 6. The company afterwards assumed defendant's liability under the agreement and paid the plaintiff the first installment of \$5,500. Plaintiff's agents dealt with the company as they would have done if it had been substituted for the defendant. Held: That there was evidence of a novation by acceptance of a new party to the agreement or of a waiver of the original contract by mutual understanding, implying an agreement that the defendant be released from his liability; and also that the company when formed could assume the liability under the agreement purporting to be assigned to it on the day before its articles were filed.

Id.—*practice—failure to give notice according to Rule IV. of intention to rely on release.*

Rule IV., requiring defendant to give notice with his answer of intention to rely upon the defense of release, does not apply to the defense of novation presented in this case.

Id.—*assignment, evidence of.*

Evidence that an assignment was made may be given without producing the written instrument. The plaintiff having afterwards placed in evidence a copy of the assignment, cannot object to its admission for the purpose of showing its contents.

OPINION OF THE COURT BY HARTWELL, J.

This was an action of assumpsit on an agreement made October 31, 1899, between the plaintiff and the defendant, whereby in consideration of the plaintiff allowing the defendant to use its system in the Hawaiian Islands and supplying instruments for five installations on Oahu, Kauai, Molokai, Maui and Hawaii the defendant agreed to erect poles for the system and furnish the labor for them, and to pay the plaintiff \$11,000, one-half on January 1 thereafter and the rest when the installations were working, and also yearly rent of £500 for five years, the plaintiff agreeing to have the instruments delivered and installations complete and the system in working order at the earliest date practicable, and to furnish three experts to remain until the work was completed and the installations in working order. Marconi and Goodbody and their attorney, Bottomley, in behalf of the plaintiff, made the agreement with the defend-

ant in New York. There was conversation between them in which they asked the defendant to whom they should make the contract, whether to Catton, Neill & Co. The defendant said he had no authority to bind Catton, Neill & Co., whereupon Goodbody said, "You spoke of a company, what is the company?" The defendant answered, "It is not organized yet." Thereupon Bottomley said, "We might make a contract with you, you could assign it to your company." The defendant testified that this "was agreeable and it was done," (trans., pp. 141-142). The defendant returned to Hawaii and formed the Inter-Island Telegraph Company, its articles of association being filed December 6, 1899, together with an assignment to the company (dated December 5) of his rights under the agreement. After its organization the company assumed the defendant's liability under the agreement (pp. 158, 252, *Ib.*), paid the first \$5,500 to the plaintiff (p. 158), a letter from the defendant to the plaintiff accompanying the payment, informing the plaintiff that he had "succeeded in organizing the company and the company has this day sent \$5,500 on account of the contract," (p. 168). The plaintiff accepted this payment from the Inter-Island Telegraph Co. It had sent its experts, Bowden and Gray, to Hawaii to superintend the installation of the system. Gray found that mistakes had been made by Bowden which he caused to be corrected. Both of them dealt with the Inter-Island Telegraph Co. as they would have done if that company had been substituted for the defendant under the agreement. Considerable expense was incurred for changes required to make the system work, and disputes arose whether the plaintiff should bear the expense. Twenty-seven hundred dollars were paid by the local company on account of these changes and \$900 were advanced by it at the request of the plaintiff's agents, (p. 126). At last the plaintiff, finding the stockholders of the local company dissatisfied and not disposed to advance more money, informed the defendant that it held him personally liable on the agreement. The jury found for the defendant and the case comes here on the plaintiff's bill of exceptions.

The defense was (1) that the plaintiff had not performed its part of the agreement, and (2) a novation, by the plaintiff accepting the Inter-Island Telegraph Co. in place of the defendant to perform his part of the agreement. The plaintiff excepted to the denial of its motion to strike out all of the evidence "on the question of release and on the question of assignment of the contract," claiming that the contract was not assignable, that it was assigned to a corporation which was not in existence at the date of the assignment, and that a release could not be shown, as the defendant had not in accordance with Rule IV. given notice with his answer of his intention to rely upon it. We do not regard Rule IV. as applicable to this defense of novation, which in substance is that the agreement contained a contemporaneous oral agreement that the defendant might transfer his rights under the contract to an incorporated company which he was to form, and by inference that he might transfer his obligations to the company. The answer of general denial allowed proof that the defendant did not agree, as alleged, that the plaintiff had not performed its part of the agreement, or that there was no breach of the agreement. There was evidence to support each one of the above named defenses.

The plaintiff's claim may thus be stated, viz.: The obligation of a contract is not avoided by assigning it to a corporation. A corporation not in existence cannot be an assignee of a contract nor assume its obligations, and after becoming a corporation cannot ratify a contract which it was not even as a *de facto* corporation capable of making. Undoubtedly the jury could have found upon the evidence that the contract was made with the mutual intention that it would be assigned to a corporation to be formed for the purpose of taking it, and that the assignment was made accordingly and assented to by the subsequent conduct of the plaintiff, with the implied agreement that the assignment should operate as a release of the defendant from his obligation. Or the evidence would have justified a finding of a "waiver of the original contract by the mutual understanding of the parties." *Van Vlieden v. Welles*, 6 Johnson 89.

"Strictly speaking, there can be no ratification by a corporation of a contract formed by its promoters prior to the completion of the corporate organization. The so-called ratification by the corporation is nothing more nor less than the making of an original contract." *Furniture Co. v. Crawford*, 127 Mo. 356, a case of a promoter's contract afterwards adopted by the corporation. "Without question, a corporation may adopt and assume the burden of contracts made by its promoters. This it may do in the same manner in which it might itself have made the original contracts. In such case the adoption of the contracts is not a ratification thereof reaching back to the date of their making, but is, in the view of the law, the making of new contracts as of the date of their adoption." Helliwell on Stock and Stockholders, Sec. 434. The courts sometimes regard the contracts made by persons engaged in organizing a company, and who become personally liable on them, as the contracts of agents of an undisclosed principal, the agent being personally liable unless the contract is expressly conditioned upon the successful formation and incorporation of the company and its ratification of his acts. 1 Beach on Private Corp., Sec. 159, and cases there cited. "But a promoter may show that by the terms under which he and the other members of a provisional committee consented to enter upon the work of organization, they were to incur no personal liability, and to have no power to bind one another." *Ib.*

The law upon the subject is, we think, correctly stated as follows: "When a promoter binds himself personally by a contract, the subsequent adoption or assumption of the contract by the corporation, when organized, will not relieve him from liability, even though the corporation may thereby become liable, unless the other party to the contract consents, so that there is a novation; for it is a well settled principle of the law of contracts that a party to a contract cannot relieve himself from its obligations by the substitution of another person, without the consent of the other party. If, however, on the adoption by a corporation of a contract made by its promoters, it is agreed

between all the parties that the corporation alone shall be liable, and the promoters released, there is a novation, the release of the promoters is supported by a sufficient consideration, and no action will afterwards lie against them on the contract. Such an agreement may be implied from the conduct of the parties. So, when a contract is made with the promoters of a corporation with the understanding at the time that it is to be assumed by the corporation when formed, and the corporation is formed and the contract assumed by it, the other party cannot hold the promoters personally liable on the contract." 1 Clark and Marshall on Private Corp., 107. In conformity with this view of the law plaintiff's exception No. 24 is overruled. The plaintiff's exceptions 1 and 19 to the admissibility of the evidence of the assignment in question are overruled, the witness having simply testified that he had made the assignment without reference to its contents. It was the plaintiff who placed in evidence (trans., p. 153), a certified copy of the articles of association of the Inter-Island Telegraph Co., which contained a copy of the assignment in question. Exception 11 is to the denial of plaintiff's motion to strike from the records exhibits 7 and 8 showing payments by the Inter-Island Telegraph Co. for the plaintiff. There was evidence that the payments were authorized by the plaintiff's agents, although a question was made whether the plaintiff or the local company was liable for them. The exception is overruled. Exception 26 to the verdict as contrary to the law and the evidence and exception 27 to the denial of a motion for a new trial on the same grounds are overruled. The instructions excepted to sufficiently present the law as we understand it, and are applicable to the evidence.

The exceptions are overruled.

Kinney, McClanahan & Cooper and *S. H. Derby* for plaintiff.
J. W. Cathcart for defendant.

IN RE ASSESSMENT OF TAXES, COMMERCIAL
PACIFIC CABLE COMPANY.

APPEAL FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

ARGUED DECEMBER 5, 1904. DECIDED JANUARY 16, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

TAXATION OF SUBMARINE CABLES—*outside of low water mark and within three mile limit—construction of statute requiring taxation of personal property within the Territory.*

Section 817, C. L., providing that with certain exceptions all "real and personal property within the Territory shall be subject to an annual tax of one per cent. upon the full value of the same" authorizes a tax upon six miles of submarine cables lying beyond the line of low water mark on the island of Oahu and within the zone of three miles in its surrounding waters.

Id.—*submarine cables not real estate.*

The submarine cables are not to be treated as real estate under the tax laws.

Id.—*valuation.*

The aggregate of the invoice price and duties paid on the cables less a deduction of ten per cent. is appropriate for taxable value.

STATEMENT OF CASE AND OF RESPECTIVE ARGUMENTS.

This is an appeal by the tax assessor for the island of Oahu from the decision of the tax appeal court in failing to find a valuation of six miles of cable lying below low water mark and all being within three miles from land. It was returned for nothing, the Cable Company claiming it was not legally assessable, and it was assessed at \$42,800. The tax appeal court held that it was not legally taxable.

Robertson & Wilder for appellant: The whole question hinges on whether this property is within the Territory or not. If within, it is clearly taxable, and if without, it is clearly not taxable. The statute (C. L., Sec. 817), provides that "except as herein provided all real property and all personal property within the Republic (now Territory) shall be subject to an annual tax," etc. It is clear that the property in question is not exempt under any Territorial statute, and so the only question is, was it within the territory on January first? The supreme court has definitely settled the point in controversy in *Hilo Sugar Co. v. Minister of Finance*, 7 Haw. 665. There, a vessel laden with sugar cleared for San Francisco from Hilo on June 30, but owing to lack of wind did not sail from the port until July 1. The statute then in force was: "All personal property within this kingdom not subject to specific taxes shall be subject to an annual tax," etc. (Comp. L., p. 119), and the owner was required to return all property belonging to him or of which he had the "possession, custody or control on the first day of July." It was held that the sugar on board the vessel was properly taxed to the owner in this kingdom, being within the kingdom on July first. There, as in the case at bar, the property was situated below low water mark. If this cable is not within the Territory then that sugar was not within the then kingdom. In *Brewer & Co. v. Luce*, 6 Haw. 554, sugar was laden on a vessel at Honolulu prior to July 1 and the bills of lading signed and mailed to foreign consignees. The vessel sailed from Honolulu at noon of July 1. It was held that the sugar was within this kingdom on July 1 and properly taxable. Although the decision was by a single justice, to wit, the late Chief Justice Judd, still it is right in line with the case at bar. Civil Laws, section 6, expressly limits the effect and operation of laws to property "within the territorial jurisdiction" of this Territory. See 3 Haw. 296. Clearly this property is within the territorial jurisdiction of this Territory. It appears from the evidence that this same property has paid duty to the federal government in order to get into the Territory. The prop

erty is not within the Territory for one purpose and without the Territory for another purpose. If the law is as contended for by the taxpayer, all that a man has to do is to take all his property below low water mark on January 1 and keep it there during that day and he cannot be taxed for that property. A vast amount of property is situated below water mark. Under the ruling of the tax appeal court a house built below low water mark cannot be taxed.

Ballou & Marx for appellee: The jurisdiction of the Territory of Hawaii for taxation purposes does not extend out into the ocean beyond low water mark, and therefore the assessment on the cables of the appellee company lying below low water mark out to the three mile limit was illegal. Jurisdiction over the seas for the space of three miles from land is an attribute of and dependent on sovereignty. It has been granted by international law to the sovereigns of the adjoining shores. 1 Farnham on Waters, Secs. 3-3c; Gould on Waters, Sec. 2; *Hardin v. Jordan*, 140 U. S. 371, 381; *Carroll v. Price*, 81 Fed. 137, 141; *Queen v. Keyn*, L. R. 2 Ex. Div. 63. There was at one time serious doubt whether the individual states of the Union possessed such jurisdiction, but it was finally held that they did on the ground that they retained sovereignty in all matters in which they had not granted it to the federal government. *Manchester v. Mass.*, 139 U. S. 240; *Commonwealth v. Manchester*, 152 Mass. 230. A territory has no sovereignty. It is merely a political subdivision, an "organized municipality" for local self government. *Talbott v. Silver Bow Co.*, 139 U. S. 438, 445-6; *Natl. Bank v. Co. of Yankton*, 101 U. S. 129, 133; *Coffield v. Territory*, 13 Haw. 478; *Carroll v. Price*, 81 Fed. 141. It has no powers or authority except such as are expressly or by fair implication conferred on it by Congress. There has been no general delegation of sovereignty by the United States to the Territory of Hawaii nor has there been any express or implied delegation of this particular attribute of sovereignty, i. e., jurisdiction for such purposes as taxation for three miles out to sea. On the contrary the United States holds the title to

and dominion over the surrounding territorial waters in trust for the future state. See 30 U. S. Stats. at Large, p 750; *Shively v. Bowlby*, 152 U. S. 1; *Carroll v. Price*, 81 Fed. 137; 1 Farnham on Waters, p 48. The Territory of Hawaii has been granted general legislative power and that includes the power of taxing property within its limits. But it does not include jurisdiction over the three mile area. Such extra territorial jurisdiction is a distinct incident of sovereignty arising as a matter of international right, and has nothing to do with local self government. Territories are said to most closely resemble counties in their nature as political subdivisions. *Natl. Bank v. County*, 101 U. S. 129, 133; *People v. Daniels*, 6 Utah 288, 292; *Coffield v. Territory*, 13 Haw. 478. It is clear that the English counties do not share the national jurisdiction out to the three mile line. *Queen v. Keyn*, L. R. 2 Ex. Div. 63. In America the boundaries of counties have sometimes been extended three miles out to sea by statute. Where that has not been done either expressly or impliedly counties by the weight of authority have no jurisdiction over the three mile area though they do include harbors and small bays. See Gould on Waters, Sec. 13. Municipalities have no power to tax property situated below low water mark. *Gilchrist's Ap.*, 109 Pa. St. 600; *Sioux City Bridge Co. v. Dakota Co.*, 61 Neb. 75. The two Hawaiian cases cited by counsel for the appellant are not in point because they deal with the jurisdiction of the sovereign kingdom of Hawaii. International law strictly speaking concedes jurisdiction over the three mile area only for purposes of self protection and of control over navigation and fisheries. Any further assertion of dominion is a political rather than a legal matter in which the courts of any given country must follow the statutes and practice of the legislative and executive departments of the government of that country. 1 Farnham on Waters, Sec. 3b. We have failed to find any assertion by the federal government that jurisdiction over the three mile area includes the power of taxation. On this question Hawaiian cases are of little importance. See *Manchester v. Mass.*, 139

U. S. 240, 258; *U. S. v. Kessler*, 26 Fed. Cas. 766, 775; *The Alexander*, 60 Fed. 914; cf. *Queen v. Keyn*, L. R. 2 Ex. Div. 71; 1 Farnham on Waters, Sec. 3b, note 1. Tax laws should be strictly construed and any doubt resolved in favor of the public. *Valkenburg v. Treas.*, 14 Haw. 182; *Castle v. Luce*, 5 Haw. 321; Cooley on Taxation, p. 200. It should not be assumed that the Territory meant in its tax to avail itself if possible of the national jurisdiction over the three mile area. A cable actually laid on the bottom of the ocean and embedded in the sand is taxable as real estate if at all. See *Vane v. Newcombe*, 132 U. S. 238; *Am., etc., Tel. Co. v. Middleton*, 80 N. Y. 408. But the cables in question cannot be taxed as real estate because the land on which they are located and to which they have become affixed belongs to the federal government and is exempt from territorial taxation.

OPINION OF THE COURT BY HARTWELL, J.

(Hatch, J., Dissenting.)

The appellant's counsel have correctly stated the question in the case, viz.: "Is this property within the Territory for taxation purposes under the statute which with certain exceptions not in this case declares that all "real and personal property within the Republic" (which by section 9 of the Organic Act must be read "within the Territory") "shall be subject to an annual tax of one per cent. upon the full value of the same." Sec. 817, C. L. The appellee's counsel do not expressly admit although their argument practically concedes that when Hawaii was a sovereign state this statute would have authorized its taxing submarine cables on the high seas between low water mark and within the three mile zone of the surrounding waters. They claim, however, that Hawaiian decisions under the monarchy are not in point both because Hawaii then held all the power over the adjoining waters of an independent nation, and also because the cases referred to property of residents of

Hawaii which was on board of ships cleared for San Francisco but still within the harbors of Hilo and Honolulu. Jurisdiction over property in harbors and ports as it is claimed does not imply jurisdiction over property on the high seas beyond and outside of harbors and ports. It is not clear that the appellee's counsel concede that Congress could delegate to the Territory any portion of its sovereign right over the three mile zone. Their brief mentions that there has been no "express or implied delegation of this particular attribute of sovereignty, *i. e.*, jurisdiction for such purposes as taxation for three miles out to sea." But the argument is clearly and we think unanswerably presented that in the absence of authority "expressly or by fair implication" conferred on it by Congress the legislature of Hawaii cannot exercise over surrounding territorial waters any legislative powers including that of taxation. Section 6 of the Organic Act provides: "That the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." The statute concerning taxation by fair implication may be regarded as applying to property in territorial waters. The effect of this could not infringe on the exercise by the general government of any sovereign powers for the purpose of national defense, protection of fisheries or any other purpose for which by common agreement of publicists, jurists and courts a nation may make exclusive use of its adjacent seas. The situs of private property on United States public lands within the Territory does not affect the right of the Territory to tax it. It is difficult to see wherein its situs in United States waters surrounding the Territory presents any other condition affecting the taxation of the property than when that situs is on public lands. If national control over national territorial waters adjacent to the coast boundary is restricted to purposes of defense, and does not include the power to tax property having its permanent situs within those waters, then it follows as a matter of course that Congress, having no power itself to tax,

could not have delegated to the Territory of Hawaii any power in that regard. If, on the other hand, Congress could lawfully authorize a national tax on property permanently placed and not in transit within such territorial waters, it could delegate the power to this Territory. No reason is suggested why power to tax property so situated should not be delegated equally with power to tax property on land within the Territory, or why a general power to tax property within the Territory should be limited by inference to the tax of property having its situs on land.

The argument of the appellee is based largely upon the decision in *Regina v. Keyn*, 2 L. R. Ex. Div. 63 (1876), in which six of the judges, including Coleridge, chief justice of the common pleas, Denman, Brett, Lindley, Amphlett and Grove, forming the minority of the court, were of the opinion that the realm of England included the three mile zone outside of the low water mark along the coast. The majority of the court, namely, Cockburn, chief justice of England, Kelly, chief baron of the exchequer, Phillimore, Bramwell, Pollock, Lush and Field, held the direct opposite. Kelly and Pollock also thought that the national control over the three mile limit was for certain limited purposes only and that those purposes did not authorize the application of English criminal law within those limits. All of the minority judges thought that the three mile belt was English territory and that English criminal law extends over it; also that admiralty had jurisdiction of offenses committed therein, whether on foreign ships or not. Gould says of this decision that "it is not certain how far it may be approved in this country." Gould on Waters, Sec. 13.

Woolsey says that the territory of a state includes, besides the terra firma within its boundaries, the waters of the interior seas, lakes and rivers wholly within the same lines, the mouths of rivers, bays and estuaries furnishing access to the land and "the coast sea to the distance of a marine league." Modern writers, he says, "agree substantially in making it" (a marine league). "an incident to territorial sovereignty on the land."

International Law, Sec. 54. Hall, in his treatise on International Law, discusses the views of writers on public law upon the subject of proprietorship of the sea; pp. 155, 157. Referring to the appropriation of marginal seas, straits and enclosed waters for the purpose of fishing rights as well as by effectively commanding such waters, this writer says: "Accordingly on the assumption that any part of the sea is susceptible of appropriation no serious question can arise as to the extent of property in marginal waters;" p. 159. Wheaton, after describing the "maritime territory of a state" as extending to its "ports, harbors, bays, mouths of rivers and adjacent parts of the sea inclosed by headlands," says: "The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." Int. Law, Sec. 177.

If we admit that the English law as held in the *Keyn* case applies to the space outside of low water mark in Hawaii with the exception, we will say, of the space within the outer fringe of reefs, which practically is land-locked, the conclusion does not follow that property of a resident in Hawaii is exempt from taxation which lies within that space and outside of the reef line. On the other hand, in accordance with the minority opinion in that case, as well as with the views of many eminent publicists, the island of Oahu would properly include for purposes of territorial taxation its surrounding waters to the extent of the three mile limit. The importance of this question to the Territory is obvious, for if the Territory has no jurisdiction for taxing purposes over this open sea limit it may have none for the punishment of territorial offenses committed within that space, or for service therein of civil or criminal process. Whatever is true of the outer portion of that limit would also be true of the inner portion as far as the low water mark. As suggested by appellant's counsel, the doctrine contended for by the Cable Company would enable any resident who wishes to

do so to evade payment of taxes on personal property by placing it outside of low water mark on the first day of January when liable to assessment. The inference that Congress did not intend that the tax laws of the Territory should apply to property in territorial waters and that the expression "within the Territory" should mean within its geographical limits would lead to possible consequences of so grave a nature that the inference ought not to be made unless for definite and satisfactory reasons. As stated by Coleridge, C. J., in the *Keyn* case: "The argument *ab inconvenienti* is perhaps not one which sound logic recognizes; and a startling conclusion does not always shew that the premises from which it follows are untenable. But the inconvenience here is so grave, and the conclusion is so startling, as to make it reasonable, I think, to say that the burden of proof lies heavy upon those who disregard the inconvenience, and maintain the conclusion."

The cables are not real property within the meaning of the tax laws. The appellee would not admit that the state could claim them, nor would a claim to them be made by the state on any theory of the law of fixtures. Telegraph and telephone wires are treated in some instances as personal property, although affixed to poles set in the ground. *Newport Co. v. Assessors*, (R. I.) 6 Am. El. Cases 659; *Water Co. v. People*, 140 Ill. 545; *People v. Assessors*, 39 N. Y. 81. It is evident, however, that the valuation of \$42,800 made by the assessor for the six miles of the two cables within the three mile limit was excessive. The invoice price, as shown by the exhibits, is \$12,833.87, on which duties were paid of \$5,579.58, aggregating \$18,413.45. We do not know the "life" of submarine cables, but assuming it to be twenty years, there would be an annual depreciation of five per cent. We think a deduction of ten per cent. from the cost price would be appropriate, leaving for taxable value \$16,572.10.

Robertson & Wilder for appellant.

Ballou & Marx for appellee.

HATCH, J., DISSENTING.

The three miles of sub-marine cable, the subject matter of the assessment for taxes in this case, does not lie within the first taxation district of the Territory of Hawaii. The first taxation district comprises the island of Oahu. The island of Oahu stops at low water mark except where there is an outer reef, in which case it may be said to extend to such reef. By no reasonable use of language, however, can the island of Oahu be said to extend any further than this into the ocean. The jurisdiction in the three miles zone surrounding the islands, which extends to a still further distance for revenue purposes, is an attribute of sovereignty of the United States. During the existence of the Republic of Hawaii such sovereignty was vested in the republic. It was ceded, however, upon annexation to the United States. It is not necessary to consider the extent or nature of the jurisdiction of the United States within such zone nor what conditions would arise should Hawaii be made a state of the Union. Under present conditions this sovereignty remains intact in the federal government. It has not been ceded by the federal government to the Territory of Hawaii. I, therefore, dissent from the opinion of the majority of the court.

**M. P. FERREIRA v. HONOLULU RAPID TRANSIT &
LAND COMPANY, LIMITED.**

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED JANUARY 9, 1905. DECIDED JANUARY 16, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

EXCEPTIONS.

A bill of exceptions, including exceptions to rulings taken during the course of a trial, and an exception to the overruling and motion for a new trial, cannot be dismissed in consequence of defects in connection with the motion for a new trial. As to exceptions taken during the trial, the bill of exceptions being perfected and allowed, will be retained.

CHOICE OF REMEDIES.

Where a party has appealed a bill of exceptions and has also sued out a writ of error covering the same matters he will be obliged to elect which procedure he will follow.

PER CURIAM.

The plaintiff moves that the defendant's bill of exceptions be stricken from the calendar on the grounds that the defendant's motion for a new trial, the rulings upon which constitute one of the grounds of exception, was improperly entertained by the trial court, a sufficient bond not having been filed with the motion conditioned not to remove or dispose of any property to the detriment of the plaintiff liable to execution, and costs not having been paid on the filing of said motion; and for the further ground that a writ of error has been sued out by the defendant

raising identically the same questions which are set out in the bill of exceptions.

The case was tried at the April term 1904. A verdict was found for the plaintiff on the 30th day of April. On the 5th day of May the defendant filed a motion for a new trial and a bond in the sum of \$25, conditioned to pay all costs of the motion and that the defendant should not to the detriment of the plaintiff remove or otherwise dispose of any property it might have liable to execution on the judgment. The verdict was for the sum of \$3,000. On May 13th the plaintiff moved that the defendant's motion for a new trial be stricken from the files on the grounds of insufficiency of the bond filed and failure to pay costs. This motion was overruled and on May 14th a further bond for \$3,100 was filed by the defendant, conditioned as was the first bond. The bond last named was filed too late. The requirement that a sufficient bond should be filed was jurisdictional. The bond for \$25 was not a sufficient bond for securing the plaintiff's rights under his verdict for \$3,000. A sufficient bond not having been filed the court below had no jurisdiction to entertain the motion for a new trial, and the exception to the ruling of the court on said motion cannot here be entertained. *Gonsalves v. Brito*, 8 Haw. 255.

The defendant's bill of exceptions, however, incorporates numerous exceptions to rulings made during the course of the trial. An order was obtained on the 13th day of May, 1904, granting the defendant additional time in which to file its bill of exceptions; the time given being ten days after the completion and delivery of the transcript of evidence. This order being obtained within twenty days after verdict, was effectual to save defendant's rights. The transcript of evidence was completed and placed on file October 27th, 1904. The bill of exceptions was presented to the trial judge on the same date and was allowed by the judge and filed on the 18th day of November, 1904. In addition to the bond for \$3,100, costs were paid by the defendant, and the sum of \$25 deposited in lieu of bond for future costs on the 17th day of May, 1904. The

bill of exceptions therefore, as to all of the exceptions taken during the course of the trial, is properly before this court.

The defendant, however, on the 29th day of October, 1904, sued out a writ of error setting out, in its assignments of errors, matters which the plaintiff claims are identical with the matters brought up for review by the defendant's bill of exceptions. The identity of the questions raised by the bill of exceptions on the writ of error is not denied by the defendant. Under these circumstances we consider that the defendant should elect between the two remedies. Though the remedies are concurrent it does not follow that the party is entitled to both of said remedies at the same time, any more than he would be entitled to maintain two actions for the same cause in courts of concurrent jurisdiction. The defendant is given five days in which to elect which remedy he will pursue.

TERRITORY OF HAWAII v. WONG TIM.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JANUARY 9, 1905. DECIDED JANUARY 27, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

PRACTICE—conditional withdrawal of plea of not guilty in order to file plea in abatement.

The defendant, January 19, had been arraigned and had pleaded not guilty to an indictment charging him with gross cheat. February 3 his attorney moved for leave to withdraw the plea in order to file a plea in abatement, stipulating that if the plea in abatement should be overruled he would be "ready immediately to go to trial upon the merits of this cause." Upon

the overruling of the plea in abatement the case went to trial, defendant's attorney making no objection, and the case was tried on the theory that the defendant had pleaded not guilty. Held: That under the stipulation and in conformity with the plain understanding of the court and the parties the plea of not guilty was re-instated.

Id.—instructions given for defendant with the remark of the judge that he gave them "but not as the law of this country."

The defendant asked for four instructions, of which the trial judge remarked to the jury, "The defendant has asked me to give you certain instructions which I shall give, but not as the law of this country." Held: That the instructions which were given with this ungracious and inappropriate remark were inapplicable to the facts of the case and therefore ought not to have been given at all; but the jury might have inferred from the remark that the law was directly the other way and that a verdict of guilty would be proper based upon a broken promise to pay, and therefore that a new trial should be ordered.

OPINION OF THE COURT BY HARTWELL, J.

The defendant was indicted and found guilty on a charge of gross cheat. Neither the indictment nor a copy of it appears in the papers filed with the bill of exceptions. The report of the testimony, however, shows that the alleged gross cheat consisted in the defendant borrowing of one Yee Leong \$150, giving his promissory note therefor upon his assurance to the lender that he (the defendant) owned a building which he was going to sell, and from the proceeds of which he told the lender that he would repay the loan. The building was sold and the money was not paid. The defendant did not own the building, having already sold it. The first exception relied on is that the court proceeded to trial without taking defendant's plea. The defendant was arraigned at the January, 1903, Term of the court. A plea to the jurisdiction was filed and overruled. Then a plea of not guilty was entered January 19. February 3 defendant's attorney moved for leave to withdraw the plea in order to file a plea in abatement, the defendant's attorney making an affidavit that the defendant had pleaded not guilty without his (the attor-

ney's) knowledge or advice, and stipulating in his affidavit that if the plea in abatement should be overruled he would be "ready immediately to go to trial upon the merits of this cause." Thereupon the plea in abatement was filed, argued and overruled. The case was then tried February 16, defendant's attorney going to trial without objection, raising no question that the defendant had not pleaded, and the case was tried on the theory that the defendant had pleaded not guilty. The second exception relied on is that the court gave to the jury certain instructions requested by the defendant, remarking, "The defendant has asked me to give you certain instructions which I shall give, but not as the law of this country." The instructions were as follows:

"1st. If you find from the evidence that Yee Leong advanced the money to the defendant with the understanding that the money was to be repaid out of a certain fund and that Yee Leong relied solely on that representation, then you must acquit the defendant.

"2nd. The promises of future payment of a present loan cannot form the basis of a charge of gross cheat.

"3rd. The false representations amounting to mere promises, though they induced the defrauded party to part with his property, are not false pretenses for they have referred to future events.

"4th. If you find from the evidence that Yee Leong loaned money to the defendant and took a note therefor, relying upon the general ability of the defendant to pay the amount of the note, and did not rely upon the securities of the house and lease in question, then your verdict will be of acquittal."

The first exception is overruled. It is evident that all concerned regarded the plea of guilty as withdrawn solely for the purpose of presenting the plea in abatement, and went to trial on the understanding that the plea of guilty was re-instated on the denial of the motion of the plea in abatement. "It would be sacrificing substance to form not to give effect to the transaction according to the plain understanding of the court and the parties." *People v. Bradner*, 107 N. Y. 1. "This stipulation reinstates the plea of not guilty, and the trial was regular."

Morton v. People, 47 Ill. 468. "The defendant has had the full benefit of the plea as if it had been again formally entered."

Hensche v. People, 16 Mich. 46.

The second exception must be sustained. We think that the instructions which were requested were inapplicable to the facts of the case and therefore ought not to have been given, but the giving of them with the ungracious and inappropriate remark that they were not given "as the law of this country" might well have had a very different effect upon the jury from merely declining to give them. The jury might have inferred from that remark that the law was directly the other way and that a verdict of guilty would be proper whether based upon the broken promise to pay or the false pretense that he owned the building. The evidence that the defendant obtained the money after promising to repay it would not have justified a verdict of guilty, and yet the effect of the judge's remark might have been to lead the jury to understand that a verdict on that ground would be correct.

The exceptions are sustained and a new trial is ordered.

W. S. Fleming, Assistant Attorney General, for the Territory.

Thayer & Hemenway for defendant.

IN THE MATTER OF THE APPLICATION OF A. W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T. K. PARKER, A MINOR, FOR A WRIT OF PROHIBITION AGAINST THE HON. GEO. D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, AND J. S. LOW, NEXT FRIEND OF ANNIE T. K. PARKER.

ORIGINAL.

ARGUED OCTOBER 20, 1904. DECIDED JANUARY 28, 1905.

FREAR, C.J., HATCH, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF HARTWELL, J.

CIRCUIT COURT OR JUDGE—*case pending before which.*

Under the circumstances set forth in the opinion, it is held that a proceeding for the removal of a guardian was brought and pending before the circuit judge at chambers and not before the circuit court, although some of the papers were endorsed in the circuit court.

CIRCUIT JUDGE—*power to enjoin proceedings before another circuit judge.*

A circuit judge at chambers in probate is not absolutely without power to restrain a guardian in a guardianship matter pending before him from procuring a hearing on the merits of a suit for partition begun by the guardian on behalf of his ward before another circuit judge pending proceedings for the removal of the guardian before the judge issuing the restraining order. A writ of prohibition against further proceedings under the restraining order and to annul that order is denied.

OPINION OF THE COURT BY FREAR, C.J.

For several years the matter of the guardianship of Annie T. K. Parker, a minor, has been before a circuit judge of the first circuit at chambers in probate, and the petitioner, A. W. Carter, has been the guardian of her property with the usual duties of such a guardian, including the duty of making an annual accounting before the circuit judge sitting in probate. On June 8, 1904, the respondent, J. S. Low, as next friend of the minor, filed a motion or petition in the matter of the guardianship of said minor for the removal of the guardian. On the day following the guardian instituted a suit before the circuit judge of the third circuit at chambers in equity against Samuel Parker, F. Wundenberg and E. P. Low for the partition of a large amount of real estate and a division of live stock, situated partly in the third circuit and partly in the fourth circuit, which make up an extensive ranch owned in part by said Samuel Parker and in part by the said minor. On the 27th of July following the respondent Low filed an amended petition for the removal of the guardian in which, among other things, there was added as one of the grounds for the removal of the guardian his institution of the suit for partition, and on the 30th of July the said Low petitioned the other respondent, the second judge of the first circuit, before whom the petition for the removal of the guardian was pending, for an order restraining the guardian from procuring a hearing in the partition suit on the merits until the further order of the probate judge. Such restraining order was issued a few days later. The guardian then brought this petition for a writ of prohibition to prevent the respondents from proceeding further upon the restraining order and to procure an annulment of that order.

Aside from several minor points raised by counsel, which it will be unnecessary to notice, the argument of the applicant for the writ is in substance that if the petition for the removal of the guardian was in the circuit court, the court was without jurisdiction because only the judge at chambers as distinguished

from the court has jurisdiction of probate and equity matters. (*Kona Coffee Company, Ltd., v. Circuit Court*, 10 Haw. 571), and if, on the other hand, that petition was before the judge at chambers, the judge was without jurisdiction for the reason that a court of equity cannot issue an injunction against proceedings in another court of equity of co-ordinate jurisdiction.

Although the present applicant for the writ alleged that the petition for removal was brought before a circuit judge, he now contends that it was before a circuit court and apparently was led to change his view in this respect by the contention of the respondents that the petition for removal was in the circuit court. As we understand the respondents' view, however, their contention is, not that that petition was before the circuit court as distinguished from the circuit judge at chambers, on the theory that the circuit court and the court of the circuit judge at chambers are distinct courts, but that it was in the circuit court on the theory that matters before the circuit judge as well as those before the circuit court, are in the circuit court,—the terms "circuit court" and "circuit judge at chambers" being used merely to indicate the two sides, namely, the law and equity sides, of that court. For an amplification of these distinctions see *Carter v. Second Judge*, ante, 242. We presume, however, that it is of little consequence what the theory of the respondents is in this respect. The question is whether the petition for removal was before the circuit court or before the judge at chambers. It is conceded that the title "In the circuit court of the first circuit, Territory of Hawaii, at chambers," is not alone sufficient to show that that matter was before the circuit court as distinguished from the circuit judge at chambers. See *Kala v. Mills*, 15 Haw. 422; *Kendall v. Holloway*, 16 Haw. 45. But it is contended that the petition for removal was actually filed in the circuit court because the words "circuit court," etc., without the words "at chambers" were endorsed (by counsel) on the petition over the file mark of the clerk, and because various other endorsements and captions of papers in that matter, in which endorsements and captions there is much diversity, point in the

same direction. In our opinion, however, the record as a whole shows clearly that the proceedings for removal were before the judge at chambers in probate. The title of the petition, the summons and other titles and endorsements of papers in that matter, and more particularly the fact that the clerk, the judge and the attorneys all proceeded on that theory, and that the hearings were actually had at chambers, that is, not at term, clearly show this. It may be added that the motion or petition for removal was made in the guardianship matter, which, it is undisputed, was before the judge at chambers.

On the alternative theory that the removal proceedings were before the judge at chambers, the applicant for the writ, as already stated, contends that the judge at chambers had no power or jurisdiction to issue an order restraining proceedings before the circuit judge of the third circuit, that is, before a court of equity of co-ordinate jurisdiction, and in this particular instance not only of co-ordinate but also of exclusive jurisdiction so far as the judge of the first circuit was concerned, because partition proceedings may be brought only in a circuit in which the real estate or a portion thereof is situated. C. L. Sec. 1146, as amended by Laws of 1903, Act 32, Sec. 12.

It is no doubt a general rule that one court of equity should not enjoin proceedings in another court of equity, but this rule has its qualifications and should not be applied further than the reasons upon which it rests require. The same rule applies to injunctions against actions at law as well as proceedings in equity, although, naturally, not to the same extent. In either case, of course, it is not the court but the party that is enjoined. In general one court should not enjoin proceedings in another where the latter is equally competent to do justice between the parties. Any other course would lead to conflict and tend to deprive the parties of their rights altogether by permitting each court to enjoin proceedings in the other.

Whether there are any cases in which a court, having jurisdiction to issue injunctions or restraining orders under ordinary circumstances, would be absolutely without jurisdiction to issue

an injunction or restraining order when and because the subject of the injunction is a proceeding in another court of equity, so that the order should be held void on a writ of prohibition, we need not say. Is not appeal to test the correctness or propriety of the order the proper remedy rather than prohibition or some other remedy based on the theory that the order is absolutely void? See *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637. However that may be, it is clear that an injunction of this sort is not void or even erroneous in all cases even as between courts of equity. An obvious instance in which such an injunction may be highly proper is in the case of interpleader proceedings, the very object of which is to settle all rights in one proceeding. Another instance is where the object is to prevent a multiplicity of suits. In other cases it seems to be considered largely a matter of sound discretion under all the circumstances. For instance, in *McCullough v. Absecom L. I. Co.*, 10 Atl. (N. J.) 606, an order was made, in a suit in equity to quiet title, restraining, upon a consideration of all the circumstances of the case, one of the parties from proceeding in another suit in equity for partition.

It may be that a court of equity may go far in protecting the rights of infants by declining to entertain suits for partition or other purposes brought by next friends when it does not appear that such suits are for the infants' best interests. See *Ames v. Ames*, 148 Ill., 321, 337; *Fox v. Suwerkrop*, 1 Beav., 583; *Sale v. Sale*, 1 Beav., 586; *Walker v. Else*, 7 Sim. 234. In such cases ordinarily there would be no occasion for another court to interfere. Moreover, a next friend is an officer of the court in which the suit is brought and not, as is the guardian in the present case, an officer of the court issuing the restraining order. It may be also that a court of probate has not the same degree of control over a guardian that a court of equity has over a receiver appointed by it,—on the theory that a guardian or receiver is an officer of the court appointing him; also that a guardian has a certain status that is more or less independent and that carries considerable discretionary power. See *De Greayer v. Superior Court*, 117 Cal. 640; *Townsend v. Kendall*, 4 Minn. 412. And

yet these considerations do not necessarily lead to the conclusion that the judge exceeded his jurisdiction in issuing the restraining order in question. The guardianship proceedings had long been before the probate judge. Even the petition for the removal of the guardian was filed before the partition suit was instituted. The institution of that suit is one of the grounds for such removal. The question of the suitability of the guardian to represent the ward is raised in the removal proceedings. If those proceedings should result in the removal of the guardian, large costs might unnecessarily be incurred against the ward's property in the partition proceedings, if the latter should be allowed to proceed during the pendency of the removal proceedings. The infant's rights might not be as well protected in the partition proceedings as in proceedings brought directly for the purpose of inquiring into the conduct and motives of the guardian. The court in the equity proceedings would have no control over the guardian as such. It would merely have control of the suit. The guardian is an officer of the probate court and to some extent at least subject to its control. The power to issue a restraining order would seem to be a proper power incidental to removal proceedings. See C. L., Sec. 1151. There is reason why a probate court should in the interests of its infant ward in a guardianship matter pending before it have greater control over a guardian appointed by it than an equity court should have over an independent person. This seems to be recognized, at least by statute, in some cases. See *In re Plumb*, 4 N. Y., Supp. 135. The propriety of issuing the restraining order in this instance cannot be inquired into upon prohibition. The question of power is the only one that can be considered. It is true no case has been cited by the respondents in which a probate judge has issued an order restraining a guardian from proceeding in a court of equity on behalf of his ward, but it is equally true that no case has been cited contra. The parties on both sides have been obliged to argue from analogy and on principle. We cannot find that a circuit judge sitting in pro-

bate is absolutely without such power under the particular circumstances of this case so as to justify the issuance of a writ of prohibition.

The petition for a permanent writ is denied and the temporary writ is dissolved.

Ballou & Marx; Kinney, McClanahan & Cooper; and Robertson & Wilder for petitioner.

J. A. Magoon and J. Lightfoot for respondents.

W. W. BIERCE, LIMITED, *v.* C. J. HUTCHINS,
TRUSTEE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED NOVEMBER 14, 1904. DECIDED JANUARY 28, 1905.

FREAR, C.J., HARTWELL AND HATCH, J.J.

ELECTION BETWEEN INCONSISTENT REMEDIES—*materialman's lien and replevin, in case of conditional sale.*

An election of a remedy based on one theory, as, for example, in the case of a conditional sale, the enforcement of a materialman's lien, which assumes that the property is in the defendant, estops the plaintiff from afterwards pursuing a different remedy based on an inconsistent theory, as, for example, an action of replevin, which assumes that the property is still in the plaintiff. An election is of rights rather than of remedies, though usually referred to as the latter, and, once made, is final, even though the action which evidences it is not carried to final judgment.

Id.—*distinguished from mistake of remedies.*

There is no election where the first remedy is adopted through ignorance of the facts or under some circumstances through ignorance of legal rights and would necessarily be ineffectual, but in

this case the court cannot say that the first remedy was adopted through such ignorance or that it would have been ineffectual.

MATERIALMAN'S LIEN—*lienable and nonlienable items under entire contract.*

A materialman's lien cannot be enforced for lienable items under an entire contract which covers nonlienable items also, but in this case the court holds that the prices of at least some of the lienable items is severable.

OPINION OF THE COURT BY FREAR, C.J.

This is an action of replevin for certain rails, cars, locomotives, equipment and materials of a railroad on the plantation of the Kona Sugar Co., Ltd., all of the property of which company had been purchased by the defendant at a receiver's sale. The plaintiff had delivered this railroad property to the company under an agreement claimed by the plaintiff to be a conditional sale and so held by the trial judge, who heard the case, jury waived, and rendered judgment for the return of the property and \$1030 damages and an alternate judgment for \$22,000 in case the property should not be returned. The case is brought here by the defendant upon numerous exceptions. It has been argued and briefed at considerable length upon many points, but, in the view that we take, it will be sufficient to decide the single point as to whether the plaintiff is estopped from bringing this action of replevin, based on the theory that the title to the property is in itself, for the reason that it had previously elected to pursue an inconsistent remedy, namely, by bringing an action for the price of the property and to enforce a materialman's lien for the same, on the theory that the title to the property had passed to the vendee, the Kona Sugar Company.

It is a well settled principle of law that when a person adopts one of two or more inconsistent positions, whether in litigation or in pais, he cannot afterwards repudiate that position and adopt another. Any decisive act with knowledge of his rights and the facts determine his election and work an estoppel. In order to work an estoppel upon the principle of election it is not necessary that the course first adopted should be pursued to com-

pletion or that it should result in success or satisfaction. When there are two or more consistent remedies they may be pursued successively at pleasure, and there will be no estoppel as to one until satisfaction has been obtained in another. But the rule is entirely different as respects inconsistent remedies or rather remedies based upon inconsistent theories. As soon as one is chosen the decision is final and no other inconsistent remedy can be pursued. The doctrine of election is not a mere matter of remedies, although it is often spoken of as if it were. It is really a matter of rights. The election is of rights rather than of remedies, the latter being the evidence of the former. These propositions do not seem to be questioned by the plaintiff and they are sustained by the cases cited *infra*.

Just how far a vendor may go in enforcing payment of the purchase price in the case of a conditional sale, which for present purposes we will assume this sale to be, is a matter of some diversity of opinion. It may be that a mere action for the price, although carried to judgment, should not be held to amount to an election where by the very terms of the contract the title is to remain in the vendor until payment of the price, for in such case an action alone for the price would not necessarily assume that the title had passed to the vendee inconsistently with the terms of the contract, and it would seem to be immaterial on the question of the transfer of title whether the payment, upon which such transfer would take place under the terms of the contract, were voluntary or forced through legal proceedings. Such was the holding in *Thomason v. Lewis*, 103 Ala. 426, 15 So. 830 (see also *Campbell Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676), although perhaps the weight of authority is the other way. See cases *infra*. Be that as it may, it seems to be pretty generally held that if the action is accompanied by an attachment upon the property in question, there will be an estoppel by election, on the theory that an attachment recognizes the title as being in the vendee, although the contrary seems to have been held in *Matthews v. Lucia*, 55 Vt. 308, and perhaps other cases. See *Crompton v. Beach*, 62 Conn. 25;

Smith v. Barber, 153 Ind. 322; *Bailey v. Hervey*, 135 Mass. 172; *Fuller v. Eanes*, 108 Ala. 464, 19 So. 366; *Heller v. Elliott*, 45 N. J. L. 564; *Button v. Tráder*, 75 Mich. 295; *Parke etc. Co. v. White River etc. Co.*, 101 Cal. 37; *Ormsby v. Dearborn* 116 Mass. 386; *Albright v. Meredith*, 58 Ohio St. 194. In *Bank v. Thomas*, 69 Tex. 237, it was even held that an endorsement of notes given for the purchase price amounted to an election which would preclude the right to reclaim the property, because a transfer of the notes did not amount to an assignment of the contract which provided for the retention of the title, but was a separation of the right to the price from the right to the property, which put it out of the power of the vendor to restore the notes in case he should desire to enforce the claim to the property. It was further held that the right to reclaim the property could not be restored by taking back the notes. In the present case the greater part of the purchase price was in the form of a note which was afterwards endorsed over by the plaintiff and later endorsed back to it, but we need express no opinion as to the effect of this. Certainly, an attempt to enforce a mechanic's lien or materialman's lien in addition to the allegations in assumpsit in that suit would indicate an election to treat the title to the property as having passed to the vendee as much as an action of assumpsit coupled with an attachment would; and it has been so held by the supreme court of Alabama, which, as shown above, had held that an action alone, though carried to judgment, would not amount to an election. In *Hickman v. Richburg*, 122 Ala. 638, 26 So. 136, it was held that an attempt, though ineffectual, to establish a material man's lien on property sold was an abandonment of the title reserved on the sale. Among other things the court said:

"It would seem, from these authorities, that the question of election is not made dependent upon whether such election may be rendered effectual or not. Any unequivocal act on the part of the vendor, recognizing the title as being in the vendee, will preclude such vendor from afterwards setting up title in himself; and it is also well settled that, when an election between inconsistent rights is once made, it cannot be afterwards revoked.

It is clear that the claimant in this case could not, under the statute, fix a material man's lien upon property the title to which was in himself; and, when he filed his claim and statement with the probate judge for the purpose of creating a lien upon the lumber in question, this was an unequivocal act on his part to treat the lumber as the property of the defendant in execution, and, of course, a waiver and abandonment of the title reserved on the sale."

The same court had made a similar decision previously. *Lehman, Durr & Co. v. Van Winkle*, 92 Ala. 443, 8 So. 870.

Cases, such as *Peninsula El. Co. v. Norris*, 100 Mich. 496, and *Case Mfg. Co. v. Smith*, 40 Fed. 339, which hold that a provision in a contract for a retention of the title does not prevent the enforcement of a lien, are not inconsistent with these propositions. They, on the contrary, show that, so far as such a provision is concerned, the remedy by lien is effectual. They do not hold that, if such a remedy is pursued, the remedy by recovery of the property afterwards would not be precluded.

The plaintiff, without disputing the soundness of these views, seeks to show that they are inapplicable to the present case, upon the principle, which also is generally recognized, that the doctrine of election of remedies does not apply where the remedy first pursued would necessarily be ineffectual. There is a distinction between an election of remedies and a mistake of remedies. An election implies that there are two or more remedies as to which a choice may be made, but if there are not, although the party may suppose that there are, there can be no election. For instance, if one should attempt to enforce a mechanic's or materialman's lien on the theory that he was a subcontractor and it should turn out that he was a principal contractor, he would not be estopped from subsequently enforcing a lien as principal contractor. *McLaughlin v. Austin*, 104 Mich. 489. The institution of a suit mistakenly as subcontractor would not alter the relation between the parties. But the retention of title by a vendor is a privilege reserved for his benefit, which he may waive at pleasure, in which case the sale would become absolute, and if he does waive this right by tak-

ing steps inconsistent with it, he cannot afterwards retrace his steps and by his own act alone restore the title to himself. An attempt to enforce a lien would not, of course, preclude his resorting to other remedies to enforce the payment of the price, provided such remedies were consistent with the theory that the property was in the defendant. There is no election where a party attempts a remedy in ignorance of material facts or under certain circumstances even in ignorance of his legal rights, if the rights of the other party are not prejudiced thereby or the rights of third parties have not intervened. It is contended by the defendant that the Kona Sugar Company and its creditors were prejudiced by the conduct of the plaintiff in pursuing its remedy under the materialman's lien law for a long period without asserting a claim to the property. As to that no opinion need be expressed. A remedy is not ineffectual, however, within the meaning of this doctrine merely because, although it may be carried to final judgment, little or nothing may be realized or satisfaction may not be obtained. In the present case the attorney who instituted the suit to enforce the materialman's lien testified in substance that that suit rather than an action to recover the property was brought in the first instance because the latter would have meant the collapse of the plantation at once on account of the railroad being essential to the taking off of a portion of the crop, and that it was discontinued because it was found that the plantation was running behind and it would be impossible to save any of its assets to pay anybody and useless to do anything to rehabilitate the plantation; and it is contended that the suit to enforce the lien was brought without much thought as to its effectiveness or results. Similar contentions have been made in other cases without success. For instance, in *Lehman, Durr & Co. v. Van Winkle*, supra, as stated in *Hickman v. Richburg*, supra, "the vendor of the property had perfected a materialman's lien under the statute, but subsequently, by novated contract, in which the title to the property was reserved to the vendor until the payment of the purchase money, some of the purchase-money notes being

extended beyond the time within which the lien created under the statute could be enforced, and which effectually destroyed the statutory lien, it was held that a suit brought to enforce the lien subsequent to the novated contract, although afterwards dismissed on advice of counsel that there was no lien to enforce, such action was an unequivocal election to treat the property as that of the defendants, and wholly inconsistent with the retention of title in the vendors under the novated contract." It may be remarked in passing that the plaintiff in the present case relies upon a novated contract. In *Richards v. Schreiber*, 98 Ia. 422, it is claimed that an action for the price with an attachment was hastily brought by attorneys not fully advised of the facts and that it should not be treated as an election of remedies, but the court said that there was nothing to show that the action was not brought with full knowledge of all the facts and that it should be given the effect of an election to treat the property as sold absolutely. This might equally well be said in the present case. In *Heller v. Elliott*, supra, an action with attachment proceedings was held an election although it was discontinued. In that case the claim was made that the action was brought in ignorance of the facts and that therefore it should not be held to be evidence of an election, but it appeared by the evidence that the ignorance consisted merely in the supposition that the goods were out of reach and therefore could not be recovered specifically. In *Hickman v. Richburg*, supra, an election was held to have been made where the attempt to enforce the lien was ineffective because of the insufficiency of the preliminary statement that was filed for the purpose of securing a lien.

What the plaintiff relies upon principally, however, in order to show that there was no remedy under the materialman's lien law is its contention that since some of the property that was sold, as, for instance, the cars and locomotives, were nonlienable (because they were not and could not be attached to the realty), and since the contract was entire (because all of the goods were sold for a lump sum), the price of the lienable items could not

be severed and therefore no lien could be enforced as to any of the items. It is no doubt true that a lien cannot be enforced for lienable items under an entire contract which covers non-lienable items also, but in our opinion the contract in the present case is not such as to prevent a severance of the price of the lienable items from the price of the nonlienable items. The original contract of February 21, 1900, specifies in detail the various items and the prices of each item as well as other terms relating to delivery, payment, etc. The property was shipped in accordance with the terms of that contract, but the bills of lading and the property were not delivered for the reason that the drafts, which, with the bills of lading, were sent to a third party for collection, were not paid. A supplementary contract was accordingly made March 13, 1901, purporting to be "in settlement of the contract" previously made. Under this latter arrangement it was agreed that the Kona Sugar Company should pay \$10,000 in cash and give its note for the sum of \$37,044.53 payable in six months with interest at 7½ per cent. and secured by the Kona Sugar Company's first mortgage bonds as collateral, whereupon the plaintiff was to deliver the property upon the condition that it should remain the property of the plaintiff until the payment of the note. This arrangement was carried out. The total amount, including the cash and the note under this arrangement, was \$47,044.53. The aggregate amounts under the first arrangement, it is said, would be about \$45,000. Probably the difference between these two amounts covered expenses that had occurred meanwhile for storage or otherwise. The first of these contracts is made a portion of the second by express reference. They must be construed together. The first shows that the price for at least a portion of the lienable materials may be ascertained.

It may be added that it is at least doubtful whether, assuming that the contract was entire so far as now appears, the court should in the present case go into the question whether the attempt to enforce a lien might have terminated successfully in whole or in part, for it is impossible to say what evidence

might have been introduced in that case. The plaintiff in instituting that proceeding was not ignorant of any of the facts. Its contention is that it did not know the law or rather that it did not take sufficient pains to ascertain the law. The ground, apparently an after-thought, now relied on to show that that suit would have been ineffectual is not one of the jurisdiction of the court or any proposition of law that would clearly show that those proceedings would have been ineffectual. It depends in part at least upon the evidence, and there is no certainty as to what that might have been in that case. That case was not carried to final judgment. It is hardly proper to try it in full as a side issue in the present case. Nor need we say whether, if a lien could not have been enforced because the contract was entire, there would be no estoppel by election.

It has been settled in this jurisdiction that the findings of fact of a trial court, jury waived, have the same force as the verdict of a jury, but upon the question of election in this case the material facts are undisputed and the construction of the contracts, which are in writing, is a matter of law for the court. Under such circumstances this court may reverse the findings and judgment of the trial court, and it does so in this case.

The exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper.

Kinney, McClanahan & Cooper, S. H. Derby and C. A. Galbraith for the plaintiff.

J. W. Cathcart, Castle & Withington and W. L. Whitney for the defendant.

YOUNG HIN, WONG TAI, WONG WAH, CHU LUM CHEE, CHU KOW, YOUNG LIN, YOUNG CHONG, LAM TAI, CHU KING, SAM SUN, LEE WO, CHAN WING, AH SUN, CHAN SING, LUNG YEE, CHAN HANG, HIN YORK, LEE CHIN, SEE SING, SEE CHONG, CHAI LEP SING AND CHU CHEE, PLAINTIFFS IN ERROR, v. H. HACKFELD AND COMPANY, LIMITED, A HAWAIIAN CORPORATION, AND HONOKAA SUGAR COMPANY, LIMITED, A HAWAIIAN CORPORATION, DEFENDANTS IN ERROR.

WRIT OF ERROR TO THE DISTRICT MAGISTRATE OF HAMAKUA,
ISLAND OF HAWAII.

SUBMITTED JANUARY 3, 1905. DECIDED JANUARY 28, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

ERROR—return of service—garnishee summons—appearance of a corporation by its manager's clerk in answer to a garnishee process.

A garnishee summons was issued by a district magistrate in a suit by H. H. & Co. v. the K. Y. Co. defendants and against Y. H. and twenty-one others named "No. 5 Gang" as garnishees. The officer's return showed service on the manager of K. Y. Co. and on Y. H. and nine others of the twenty-two named as garnishees. No appearance was made for the defendants or the garnishees and judgment was made against them by default. The next day another garnishee summons was issued in an action on this judgment by the same plaintiff against the garnishees named in the first case as defendants and the Honokaa Sugar Co. as garnishee. The return of service on the defendants was as follows: "Served the within

summons on Young Hin et als., as therein named as defendants by handing each of them a true and attested copy thereof and at the same time showing them the original at Honokaa this 16th day of April, 1904." The return of service on the garnishee was: "Served the within summons on H. S. Comp. Ltd., therein named as garnishee by leaving with him a true and attested copy thereof at ——— this 16th day of April, 1904." There was no appearance for the defendants at the hearing of the second suit. The H. S. Co., garnishee, filed a statement that it was indebted to the defendants in more than the amount sued for, signed "Honokaa Sugar Company, per K. S. Gjerdrum, manager, per C. H. Bragg" and sworn to by Bragg. Judgment was rendered for the plaintiffs in the second suit and the garnishee was ordered to pay the amount. There was nothing in the record of the second case showing that the judgment was based on the judgment in the first case. The garnishee summons in each of the above cases was upon the printed form commonly used. Held: (1) The return of service in each case was sufficient; (2) the plaintiffs' complaint in the second case was not defective in failing to aver their ownership of the judgment sued on; (3) there was no error in the magistrate taking judicial notice in the second case of his judgment in the previous case; (4) the rights of the plaintiffs in error not being injuriously affected by the unauthorized appearance (if any there was) of the H. S. Co., they could not assign such unauthorized appearance as error.

OPINION OF THE COURT BY HARTWELL, J.

The record of the district magistrate of Hamakua shows that on April 15, 1904, he rendered judgment for the plaintiff in an action on a note for \$273.15 by *H. Hackfeld & Co., Ltd., v. Kwong Yick Company* defendants and Young Hin and twenty-one others named as "No. 5 Gang" as garnishees. The summons was issued on the printed form in use for many years styled "Garnishee Summons," containing a request that the court insert in the summons a direction to the officer to leave a true and attested copy with the garnishees, summoning them to appear, etc., and containing a direction accordingly to the officer to "leave a true and attested copy hereof with said garnishee" and to "summon them to appear," etc. The officer served the summons on the manager of the defendant company Young Hin and, as stated

in his return, on Young Hin and nine others of the twenty-two named as garnishees. The record shows that there was no appearance of the defendants or of the garnishees and shows judgment by default for the amount of the note with interest and costs and an order that the garnishees pay this amount. On April 16 the magistrate issued another garnishee summons in an action on this judgment by the same plaintiff against the garnishees named in the first case "commonly known as Young Hin Gang No. 5" as defendants and the Honokaa Sugar Company as garnishee. The return of the service on the defendants is as follows: "Served the within summons on Young Hin et als., as therein named as defendants by handing each of them a true and attested copy thereof and at the same time showing them the original at Honokaa this 16th day of April, 1904." The return of service on the garnishee was: "Served the within summons on H. S. Comp. Ltd., therein named as garnishee by leaving with him a true and attested copy thereof at ——— this 16th day of April, 1904." At the hearing on this second suit there was no appearance for the defendants. The Honokaa Sugar Company, garnishee, filed a statement that it was "indebted to the said defendants in more than the amount sued for" which was signed "Honokaa Sugar Company, per K. S. Gjerdrum, manager, per C. H. Bragg," and was sworn to by Bragg. The magistrate rendered judgment for the amount claimed with costs. The defendants in this last case bring this writ of error, making the following assignment of errors:

"1. The said district magistrate had no jurisdiction over the persons of the defendants. 2. The facts stated in the summons are not sufficient to constitute a cause of action. 3. The judgment of the district magistrate is contrary to the evidence. 4. The plaintiff filed no written petition for process in the case. 5. The district magistrate had no jurisdiction in issuing summons to insert therein a direction to the officer serving the same to summon the Honokaa Sugar Company, Ltd., to appear as garnishee. 6. The district magistrate had no jurisdiction over the Honokaa Sugar Company, Ltd. 7. The Honokaa Sugar Company, Ltd., was not served with process in the case. 8. The

district magistrate had no jurisdiction to order the Honokaa Sugar Company, Ltd., as garnishees to pay the amount of the judgment against plaintiffs in error. 9. The judgment against plaintiffs in error sued upon was void. 10. The district magistrate had no jurisdiction on the 15th day of April, A. D. 1904, to give a judgment in the matter of *H. Hackfeld & Company, Ltd., v. Kwong Yick Co.* in favor of the plaintiff and against the plaintiffs in error, as garnishees in the sum of \$291.45 for lack of a written petition for process in that case and for lack of service on said plaintiffs in error, as garnishees."

1. It is claimed that the return was fatally defective in not complying with the statute (Sec. 1219, C. L.), requiring that the record of the officer's service of process "shall state the name of the person served and the time and place of service," and providing that "such record shall be prima facie evidence of all it contains and no further proof thereof shall be required unless either party shall desire to examine such officer." We think the record was sufficient as prima facie evidence of service on each of the defendants named in the process. 2. Next it is claimed that the plaintiffs' complaint is defective in failing to aver their ownership of the judgment sued on. The declaration would not contain such averment at common law and it is unnecessary. 3. Next it is claimed that the garnishee summons is insufficient under the decision in *Frag v. Adams*, 5 Haw. 664, in failing to contain a petition for process against the garnishee. We consider the form used as sufficiently conforming to the statute. 4. As to the record failing to show evidence on which the magistrate based his judgment, it is evident that he took judicial notice of his judgment made two days before, although he failed to record that he did so or to re-enter the record in his judgment in the former case. We see no error in this. "There are a few instances in which, because of the notoriety of the proceedings, or because of their close connection with the matter in controversy, courts have taken judicial notice of proceedings in other causes." 1 Elliott on Evidence, Sec. 58. 5. It is claimed as error that the return of service on "H. S. Comp. Ltd., therein named as garnishee" is defective in failing to show

with whom the copy of the summons was left, or that it was left with any officer or agent of the corporation upon service so authorized to be made, or who transacted the business of the corporation, and that the return is contrary to the provisions of second 1219, C. L.; moreover, that the appearance by this garnishee "per C. H. Bragg" is not shown to have been authorized by the corporation. It is claimed that the manager or the manager's clerk is not an officer of the corporation and that a garnishee cannot voluntarily answer so as to affect the rights of the defendant or of his corporation. The return was sufficient without showing the manner of service in view of the appearance made by the garnishee. If appearance by the manager's clerk for the purpose of testifying to the indebtedness of the company to the defendants was unauthorized (which is not to be presumed), that would in no way injuriously affect the rights of the plaintiffs in error who "cannot assign errors committed against a co-defendant where his" (their) "rights as in this case are not affected by the error." *Robinson v. Brown*, 82 Ill. 281.

The writ of error is dismissed.

Lyle A. Dickey for plaintiffs in error.

C. Brown, F. E. Thompson and C. F. Clemons for defendants in error.

WILLIAM IONA, ISAAC IONA AND WAHINE IONA
v. UU, FLORA UU AND T. BRANDT.

QUESTIONS RESERVED BY CIRCUIT COURT, FIFTH CIRCUIT.

SUBMITTED JANUARY 10, 1905. DECIDED JANUARY 28, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

COURTESY—*duration of.*

Under the former statute, under which the husband had an estate in the wife's lands after her death until the children attained majority, the estate ceased as to each child's portion upon that child's attaining majority.

ID.—*tenant by, power to lease.*

Such tenant by courtesy had no authority to lease the land beyond the age of majority of the children.

PARENT—*power of, to lease child's lands.*

A father as such or as natural guardian has no authority to lease his child's land.

ADVERSE POSSESSION—*claim of, under lease, after lessor's estate ceased.*

In order to sustain a defense of adverse possession, there must be shown not only possession but a claim of ownership. A claim of a term of years is not sufficient. Heirs may recover from one who claims solely under a lease made by a tenant by curtesy to extend beyond the estate by curtesy, even though the period prescribed by the statute of limitations has elapsed since the termination of the estate by curtesy. In such case the term of years is in recognition of and not contradictory to the fee, and the lessee holds over permissively or by sufferance.

OPINION OF THE COURT BY FREAR, C.J.

This is an action of ejectment for land covered by R. P. 6634, L. C. A. 3588 to Koula. Kawelo, the patentee's grantee, died

in 1879 leaving her husband, Iona, and three sons, the plaintiffs, the latter all then under age. Iona in 1883 executed a paid up lease of the land for a term of 50 years for \$200 to one Akiona alias Achong. Akiona went to China about ten years afterwards and a year or two after his departure one Chin Fat Kee, representing himself as agent of Akiona, sold the lease and a house upon the land to the defendant Brandt for \$300, as shown by a receipt for the money, no formal assignment of the lease having been made. Brandt entered into possession and afterwards put the other two defendants, Uu and Flora Uu, his wife, in possession as tenants of his.

For the purposes of the case it will be assumed that there was a valid assignment of the lease from Akiona to Brandt, so far as the authority of Chin Fat Kee and the formality of the assignment are concerned. Iona, who died in 1896 or 1897, had, under the law (Civil Code, Sec. 1286) in force prior to the married woman's act of 1888, an estate by curtesy in the land until the sons should attain majority, and the sons took the fee by descent subject to such estate by curtesy. It is not disputed that the lease made by Iona to Akiona was good until the termination of Iona's estate by curtesy; and that such would be the case was held in *Hanuna v. Unna*, 6 Haw. 485. The two older sons attained majority more than ten years, and the youngest son less than ten years, before the commencement of this action—ten years being the period prescribed by the statute of limitations.

The questions reserved by the trial judge are in substance as follows: (1) Did the estate by curtesy continue, and therefore was the lease good, as to all the land until the youngest son attained majority or did it cease as to one-third of the land upon each son's attaining majority? (2) If the right of action accrued as to each son at majority, were the two older sons barred by the statute and, if so, could there be a discontinuance or nonsuit as to them and a recovery by the youngest son? (3) Was the lease void or only voidable as to the sons upon their attaining majority, and, if void, would the possession of the defendants, which began permissively under Iona, continue

permissive thereafter, or, if voidable, would failure on the part of one or all of the sons to disavow it seasonably, confirm it?

(4) If the youngest alone could recover, could he recover the entire land? Freeman on Co-tenancy, Sec. 168; *Williams v. Sutton*, 43 Cal. 71, are cited with reference to the last question.

The estate by curtesy ceased as to one-third of the land upon each son's attaining majority, and Iona could not in his own right lease the land for a period longer than that to which he was entitled by curtesy and could not as father or natural guardian lease his sons' land at all. *Hanuna v. Iona*, supra. Even a statutory guardian is without authority to lease his ward's land beyond the latter's majority, although in such case the lease would be only voidable after such majority and could be ratified or disaffirmed by the ward upon attaining majority. *Nawahi v. Hakalau Plant. Co.*, 14 Haw. 460. Whether the lease in the present case was void or only voidable after the sons' attaining majority it will not be necessary to decide. There is no evidence of ratification. A mere failure to disaffirm would not under the circumstances of this case amount to an affirmation.

In our opinion the lessee and those claiming under him continued to hold permissively or by sufferance after the termination of the lessor's estate by curtesy. If Iona had executed a deed purporting to convey the land in fee instead of a lease for a term of years the result might have been different, though as to this we need express no opinion. Many cases hold that the grantee in fee of a life tenant holds adversely after the termination of the life estate although not during the life estate. But assuming that to be the correct doctrine where a grant is made in fee simple, it does not follow that a lessee for a term of years would hold adversely for the remainder of the term, after the termination of the estate of the lessor. To sustain a claim of adverse possession not only must there be possession but it must be under a claim of ownership. A claim for a term of years under a lease, which is the only claim the defendants make in this case, implies that there is an outstanding fee in someone, under whom the lessee holds. That being the case the lessee can-

not defend on the plea of adverse possession against the owner of the fee but is forced to rely upon the validity of his claim under the lease, and this is so even though he obtained the lease from one who had no authority to give it. This is well illustrated by the case of *Bedell v. Shaw*, 59 N. Y., 46. In that case the City of Brooklyn executed a deed purporting to convey a term of 1500 years by virtue of an alleged sale for the non-payment of an assessment. That was in 1838. In 1846 the lessee conveyed the residue of the term to another who immediately entered into possession, claiming title under the deed, and erected a building on the premises, and he and his tenants continued to occupy the premises until the owner of the property brought an action of ejectment in 1870 against the tenants then in possession. The court held that the defense of adverse possession was not sustained, saying among other things:

“This case is to be distinguished from that of *Sands v. Hughes* (53 N. Y. 287). There the defendants began and kept up their possession for over twenty years, with a claim to the entire title. The conveyances under which they claimed were of the fee. Their claim denied the existence of any other title than theirs. Possession for such a time, under such a claim, was adverse, though the title was not rightful. Here, however, the claim in its beginning, and ever since, admits that there is a rightful title in fee elsewhere than in the defendants, and that it is in the plaintiff, and admits that it is under that rightful title that possession was taken and is kept up. It is not a claim to the entire title, a claim to the fee. It is not a claim in utter hostility to the true title. If there be a rightful title, it, *prima facie*, draws to it the right of immediate possession. It is for the occupant to show that under the title he has a right to possession, for his possession does not begin in hostility to that title, but in accord with it and in consequence of it. What is the claim of the defendants? It is a claim for an unexpired term. They make that claim under a conveyance, and not otherwise. The conveyance they produce purports no more than to grant the remainder yet to come of an unexpired term. The defendants’ claim is, then, that they are tenants for years. A tenant for years is possessed, not properly of the land, but of the term for years. * * * It is true that the lease under which they claim is not from the

owner. It is from the municipal government against the will of the owner. But one coming into an estate for life, by purchase at sheriff's sale, may not establish an adverse possession against the reversioner. * * * Possession of land long enough continued may ripen into a title. It must be accompanied by a claim of a title in fee. Possession alone, unexplained by collateral circumstances, evidences no more than that the occupation is rightful. But mere possession is as consistent with a right to occupy under a lease for years, or for life, as in fee. The quality and extent of the right, depends upon the claim which goes with it. To the extent of the claim, will the presumption of the law go in favor of the claimant, and no farther. If he asserts only a claim for years, and that is consistent with his possession, the law will not, upon the mere fact of his possession, adjudge him to be in, under a higher right or larger estate. * * * So here, from the claim made by the defendants, the law adjudges their possession to be no greater than that of tenants for a term of years. But the possession of a tenant for life or for a term of years, is not adverse to, but is consistent with, the title of the reversioner in fee."

A different branch of the case just cited suggests that possibly the defendants in the present case may properly be allowed the value of improvements upon the land by way of reduction or extinction of the damages, if any, if they can show that they and the lessee under whom they hold entered and continued in possession in good faith and made improvements of a valuable and permanent nature.

The conclusion is that none of the plaintiffs are barred by the statute of limitations and that the defendants cannot rely upon adverse possession as a defense against the heirs when their only claim is of a term of years under a lease made by a tenant by curtesy. The case is remanded to the circuit court of the fifth circuit for such further proceedings as may be proper.

John D. Willard for plaintiffs.

M. F. Prosser for defendants.

E. J. LORD AND J. J. BELSER, COMPLAINANTS, v.
JOHN WALKER, C. S. HOLLOWAY, SUPERIN-
TENDENT OF PUBLIC WORKS, AND J. H.
FISHER, AUDITOR, RESPONDENTS.

EQUITY APPEAL FROM FIRST CIRCUIT.

SUBMITTED JANUARY 10, 1905. DECIDED JANUARY 28, 1905.

HARTWELL AND HATCH, JJ., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF FREAR, C.J.

CONTRACT FOR PUBLIC WORKS—*compliance with terms of advertisement.*

The superintendent of public works advertised for proposals for the performance of certain public work, and required that each proposal must be accompanied by a certified check of 3 per cent. of the amount of the proposal, payable to the superintendent of public works as surety that if the proposal be accepted a contract would be entered into. W. filed a proposal and with it a bill of exchange upon a commercial house, certified by the latter, for the requisite amount payable to the order of the superintendent of public works.

Held, within the discretion of the superintendent of public works to take the security tendered by W. as a substantial compliance with the terms of the advertisement calling for tenders.

OPINION OF THE COURT BY HATCH, J.

The plaintiffs brought a bill for an injunction to enjoin and restrain the superintendent of public works from executing a certain contract with the defendant Walker for dredging the Alakea street slip and from approving any vouchers for work done or materials furnished under the contract, and to restrain the auditor of the Territory from approving any vouchers for

work done or materials furnished under the contract or issuing any warrants in payment of bills or claims for work done or materials furnished, and to restrain the defendant Walker from receiving any money under the contract.

The bill shows that the superintendent advertised for bidders as follows:

DREDGING ALAKEA STREET SLIP.

"Proposals will be received at the office of the supt. of public works, until 12 o'clock noon of Nov. 19th, 1904, for excavating and dredging Alakea street slip, Honolulu, T. H.

"Plans and specifications are on file at the office of the asst. supt. of public works, copies of which will be furnished intending bidders on receipt of \$5, which sum will be returned intending bidder after he has deposited his bid and returned the plans and specifications.

"Proposals must be submitted on the blank forms, which will be furnished by the asst. supt. of public works and enclosed in a sealed envelope addressed to Hon. C. S. Holloway, supt. of public works, Honolulu, T. H., endorsed 'Proposal for excavating and dredging Alakea St. slip.'

"Each proposal must contain the full name of the party or parties making the same and all persons interested therein and must be accompanied by a certified check of 3 per cent. of the amount of the proposal, payable to C. S. Holloway, superintendent of public works, as surety that if the proposal be accepted, a contract will be entered into.

"No proposal will be entertained unless made on the blanks furnished by the asst. supt. of public works, previous to 12 o'clock noon on the day specified.

"The superintendent reserves the right to reject any or all bids.

"C. S. HOLLOWAY,

"Superintendent of Public Works.

"Dept. of Public Works, Honolulu, Sept. 6th, 1904."

4.

"That in response to said advertisement several parties filed with said Superintendent of Public Works proposals or bids for the work referred to therein, among them being the respondent, John Walker, and said complainant, Lord and Belser.

5.

"That accompanying the proposal or bid of said complainants was a certified check of 3 per cent. of the amount of the proposal made payable to said C. S. Holloway, Superintendent of Public Works, as surety; that if the proposal be accepted a contract would be entered into, in accordance with the provisions of said advertisement.

6.

"That upon the opening of said bids or proposals, it was found that the lowest bidder was the said respondent, John Walker. And that it also then appeared that the bid of said John Walker was not accompanied by a certified check of 3 per cent. of the amount of his proposal as required by the terms of the aforesaid advertisement.

7.

"That said bid of said respondent, John Walker, was accompanied by a pretended certified check, consisting of a piece of paper containing the following words and figures, to wit:

"Honolulu, 19 November, 1904.

"Pay to the Superintendent of Public Works or order the sum of six thousand dollars.

"To Messrs. Theo. H. Davies & Co., Ltd.

"Honolulu

"John Walker."

And that written across the face thereof were the following words, to wit:

"Certified. Theo. H. Davies & Co., Ltd.

"W. H. Baird, Treasurer."

8.

"That the said paper was not and is not a certified check within the meaning and intent of the aforesaid advertisement inasmuch as Theo. H. Davies & Co., Limited, the corporation therein named as drawee is not a banker nor a banking house and is not engaged in the banking business. And that said paper does not purport to be drawn upon any fund or deposit in the possession of said corporation or belonging to the said John Walker.

"And complainants are informed and believe and so allege upon information and belief that said paper or pretended check was not in fact drawn upon or against any such fund or deposit.

9.

"That said respondent, C. S. Holloway, as Superintendent of Public Works, has awarded the contract to perform said work to

the said John Walker, and said Holloway and said Walker are about to execute such contract and a bond in conjunction therewith for the completion of the work.

10.

"That said John Walker is about to commence work under said contract; and said Superintendent of Public Works is about to incur obligations thereunder in the name of the Territory of Hawaii, and intends to pay out large sums of money as said work progresses and to approve vouchers therefor, and for materials to be furnished under said contract by said John Walker; and that said J. H. Fisher, as auditor aforesaid will, if not enjoined, issue warrants upon the treasury of the Territory to said John Walker in payment of the obligations so proposed to be incurred by said Superintendent of Public Works as aforesaid.

11.

"That said contract is null and void and contrary to law and the awarding thereof to said John Walker as herein set forth was illegal and unfair and will result in irreparable injury to the complainants herein as well as to all other taxpayers of said Territory; and deprives said complainants of their right of fair, equal and impartial competition under the law in bidding on public contracts."

The answer of the superintendent and auditor admitting substantially the averments in the bill denies "that the bid of said John Walker was not accompanied by a certified check of 3 per cent. of the amount of his proposal as required by the terms of the aforesaid advertisement.

"They deny that the paper filed by said John Walker was not and is not a certified check within the meaning and intent of the aforesaid advertisement, and have no knowledge or information sufficient to form a belief as to the other allegations contained in paragraph 8 of said complaint, and therefore deny the same and leave the complainants to their proofs thereof."

The answer of the defendant Walker is in substance the same as that of the superintendent and auditor.

The bid of the respondent Walker was \$168,000. The next lowest bidder was \$188,900. The bid of the complainants was \$209,000, there being one higher bid for \$215,860. The complainants appellants contend as follows:

- (1.) That the draft which accompanied Walker's bid was not a certified check within the meaning of the law.
- (2.) That the requirement of a certified check must be understood in its usual acceptance as known in the law.
- (3.) That the requirement having been imposed upon all bidders both by the terms of the advertisement and also by the specifications, it became a condition precedent, and no bid not accompanied by such a check could be considered.
- (4.) That if the superintendent had authority to prescribe such a condition it was binding on himself as well as on the bidders and could not be waived.
- (5.) That, if the superintendent had no authority to impose such a condition, the imposition of it invalidated the whole advertisement and the bids filed pursuant to it.
- (6.) That even if the superintendent had authority to insert the condition in the advertisement, and also to waive it, he had no authority to waive the provision of the specifications which contained the same clause.
- (7.) That, therefore, the decree should be reversed and the cause remanded with instructions to grant the injunction.

We hold that the superintendent of public works had authority to make the condition that a certified check should be deposited with the bid, that such requirement was a reasonable one and that it was not within the power of the superintendent to waive it. Also that the requirement was obligatory upon all bidders and that a bid unaccompanied by such a check or its equivalent could not be considered. The question remains, did the respondent Walker substantially comply with the requirement. Strictly, the instrument filed by the respondent Walker was an inland bill of exchange accepted by Theo. H. Davies & Co., Ltd. In its general characteristics other than it was not drawn on a banker it was substantially equivalent to an accepted and certified check. In general terms a check is an inland bill of exchange. Edwards on Bills, 396. Daniel on Negotiable Instruments, Sec.

1567, states that it is often said that a check is, in legal effect, a bill of exchange drawn on a bank or banking house with some peculiarities; that in form a check is a bill on a banking house payable on demand, as we conceive, and that it is perfectly correct to say that it is a bill with some peculiarities or a species of bill; that Sir G. Jessel, Master of the Rolls, calls it a bill of exchange payable at a bankers. Daniel says that this is not a definition. He further says, however, that a check comes within the general designation of a bill so far that a statute authorizing the protest of inland bills would include inland checks; and in *Bull v. Bank of Kasson*, 123 U. S. 105, it was held that checks might be properly designated as drafts or bills of exchange for the purpose of giving the court jurisdiction. The court says, "In the record the instruments by which the action is brought are designated as 'drafts or bills of exchange;' in a general sense they may be thus designated, for they are orders of one party upon another for the payment of money which is the essential characteristic of drafts or bills of exchange. They are also negotiable and pass for delivery and are within the description of instruments of that character in the act of March 3, 1875, prescribing the jurisdiction of circuit courts of the United States." The court continues, "that in strictness they are bank checks, and have all the particulars in which such instruments differ or may differ from regular bills of exchange."

The principal points of difference between a check strictly considered and an accepted bill of exchange are generally as follows: (1) A check is always drawn on a bank or banker; (2) No days of grace are allowed; (3) The drawer of a check is not discharged by the laches of the holder unless he has sustained injury (4) A check is not due until payment is demanded; (5) It is by its face the appropriation of so much money of the drawer; (6) It is not necessary that the drawer of a bill should have funds in the hands of the drawee. The character of a check, however, changes on being certified; it then more closely resembles a bill of exchange. The certification in the one case and the acceptance in the other are in effect identical

and constitute a resemblance in substantial particulars. The office of a simple check is merely to require the immediate payment of money. Neither the drawer nor the holder has the right to demand from the bank anything but payment and the bank has no right, as against the drawer, to do anything else but pay it, consequently there is no such thing as acceptance of checks in the ordinary sense of the term. Daniel on Nego. Instr., Sec. 1601. By certifying a check the bank becomes the principal and only debtor. It has been said to be, and obviously is, "equivalent to acceptance" in respect to the obligation it creates upon the bank. Daniels, 1601 A. *Merchants' Bank v. State Bank*, 10 Wall. 648; *Espy v. Bank of Cincinnati*, 18 Wall. 604, on p. 620 says, "but as one of the main elements of utility in a bill of exchange is that it shall circulate freely and it may thus pass through many hands on the faith of the acceptor's signature, it may possibly be that he should be responsible for the promise contained in it as it came from his hands, for it was not drawn on a special fund and the possession of such fund by him does not affect his liability. By such acceptance he becomes primarily liable as if he were the maker of a promissory note. How far these reasons should be applied to a certification that a check was good seems extremely doubtful both on principle and authority. Where the object is to use the endorsement to put the check in circulation or to raise money on it, or to use it as money, and this object is known to the certifying bank, it may be argued with some force that the bank should, as in the case of the acceptance of a bill of exchange, be held responsible for the validity of the check as it came from the hands of the certifying bank. Such a rule would seem to be just when checks are certified, as we know they often are, without reference to the presence of funds by the drawer, and when the well known purpose is to give the drawer a credit by enabling him to use the check as money by putting it in circulation." This case involved the question as to who should stand the loss resulting from a forged signature. The last sentence of the quotation, however, applied strictly to a transaction like the

present and demonstrates that there is no substantial difference between the acceptance deposited by the respondent Walker with his bid and the certified check deposited by the other bidders. This is not a case which calls for a strict and narrow construction of the word "check." The deposit was called for to furnish a temporary security. The amount of the deposit did not comprise the substance of the contract. The case differs from a contract for the sale of land where all terms of payment are strictly construed. This deposit, however, was not a payment. It was within the authority of the superintendent of public works to accept what in his judgment might be an equivalent to a certified check. If the amount called for had been tendered in cash it could not be reasonably contended that the bid must be rejected for non-compliance with the terms of the advertisement. On the other hand, the tender of a certified check of a foreign bank not doing business in this Territory, or of a bank located in a distant state, the standing or responsibility of which the superintendent of public works would have no means of readily ascertaining, might be a compliance with the letter of the advertisement, but would not be of its spirit and meaning. In the *People v. Contracting Board*, 46 Barb. 254, a call for sealed proposals for certain canal work required that all proposals must be accompanied by a certificate of deposit in some banking institution, certifying that the sums specified have been deposited to the credit of the auditor of the canal department. The relator sent in with his bid a certificate that he (the relator) had deposited in a bank the requisite sum to the credit of himself, which he endorsed, "Pay N. S. B., Auditor, etc., or order." His bid was rejected on the ground that a certificate of deposit to his own credit and endorsed as stated did not comply with the terms of the notice. Held, that the relator, being the lowest bidder, and having furnished the requisite security for performance, was clearly entitled to the contract and that the contracting board in rejecting his bid and awarding the contract to another acted without authority.

Moreover, a further reason why a strict definition of the term

"certified check" is not called for in the present case is that the rights of none of the parties primarily concerned, namely, the superintendent of public works, Messrs. Theo. H. Davies & Co., Ltd., and the respondent Walker, turned upon any consideration of the specific qualities of a check strictly considered; for instance, no question here arises as to whether the acceptance can be treated as dishonored paper and thus subject to a set-off as was the case in *Bull v. Bank of Kasson*. Rights of the superintendent of public works as against the acceptor of the bill, are the same and his security is as good whether the instrument in question is an accepted bill or a check; in other words, whether the instrument comes within the definition of an accepted inland bill of exchange payable on demand without grace or whether it is that specific variety of such a bill of exchange as is termed a check. The contention of the complaint turns on a mere verbal definition. The question of substance is did the superintendent of public works obtain a guarantee, of the general nature of that called for, that respondent Walker would stand to his bid, if accepted, and enter into a contract to carry out the work. We consider this to have been the case, and that it was within the power of the superintendent of public works to hold as he did, that this requirement of the advertisement had been substantially complied with. This, as above stated, is very different from waiving the requirement in toto. The bidders were all bidding upon substantially the same footing, the object to be secured was to obtain a substantial pecuniary guarantee of good faith, but this was preliminary only to cover simply the period from making the tender to the time when the contract should be awarded, when further security and an entirely different obligation would be exacted to secure the performance of the contract. The commercial paper of a well known business house, the paper of the class known as banking paper, would seem, if held satisfactory by the superintendent of public works, to be sufficient to guarantee the good faith of the bidder. The actual value of the acceptance in this case is not questioned, nor is there anything in the facts on which to base a charge of actual or pos-

sible fraud or collusion. In giving the superintendent of public works a reasonable latitude of construction of the conditions imposed by him the rights of the public are observed and secured without tangible injury to any of the competing bidders.

As for the plaintiff's claim that the acceptance of drafts is not authorized by the charters of commercial houses, "in general it may be said that one whose rights are not injuriously affected by reason of the fact that a corporation is acting in excess of its powers, or beyond the warrant of law, has no standing in court to complain of the same." 5 Thomp. on Corp., Sec. 6030. A violation of the charter, if any there was in this case, "does not of itself affect any of his (the plaintiff's) rights." *Railroad Co. v. Ellerman*, 105 U. S. 174.

The injunction prayed for is disallowed and the complainants' bill of complaint dismissed.

Robertson & Wilder for complainants.

Lorrin Andrews, Attorney General, for respondents Holloway and Fisher.

Holmes & Stanley for respondent Walker.

LUCY K. PEABODY, PLAINTIFF IN ERROR, v. S. M. DAMON, J. O. CARTER, W. F. ALLEN, CHARLES M. HYDE AND W. O. SMITH, TRUSTEES UNDER THE WILL OF B. P. BISHOP, DECEASED, DEFENDANTS IN ERROR.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 10, 1905. DECIDED JANUARY 30, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

EJECTMENT—equitable estoppel by silence—motive for silence.

Plaintiff claimed the land sued for as one of the heirs at law of Charles Kanaina. Upon the administrator's petition in 1879, alleging payment of debts and that certain persons decreed to be heirs were unable to agree on partition, but that the majority desired a sale at public auction, and praying for an order of notice calling upon all interested to appear and show cause and that the lands be sold, order was made accordingly and the property was sold at auction. The land in question was bought by Ruth Keelikolani. Her devisee, Bernice Pauahi Bishop, devised the property to five trustees and their successors, defendants being four of the present trustees. The plaintiff knew of the proceedings above mentioned, of the opportunity to present her claim, of the advertisement and the day the sale would take place and of the sale that was made; also that she was related to the decedent. She made no claim because of instructions from her grandmother that she should not set up her pedigree as in any way connected with the Kamehamehas. She told no one about her claim, and after the death of the royal princesses Ruth and Pauahi she thought no more of the matter until informed that all of the claimants of the estate were going to be shut off. She did not intend to deceive or mislead anyone. Upon defendants' motion the court directed a verdict for them on

the ground that the facts showed that the plaintiff was equitably estopped from bringing this action. Held: The verdict was properly directed, the plaintiff having had "the opportunity and apparent duty to speak," and that her silence under the circumstances equitably estops her from now presenting her claim; also that her motive for not presenting her claim was immaterial, the consequences being the same as if she had intended that her silence should lull those concerned into a sense of security.

Id., PRACTICE—*question of law.*

Held: The question of estoppel in this case was not for the jury but for the court, there being no facts in controversy and no uncertainty as to inferences to be drawn from them, following *Smith v. Hamakua Mill Co.*, 15 Haw. 655.

OPINION OF THE COURT BY HARTWELL, J.

The plaintiff in error brought an action of ejectment against the defendants in error which was tried in the circuit court of the first circuit. At the close of the evidence the defendants moved that a verdict in their favor be directed on several grounds, including equitable estoppel. On this ground alone the motion was granted. The error assigned is that "the court erred in having against plaintiff's objection directed the jury to render a verdict against the plaintiff and in favor of the defendants." The defendants in error contend that the three grounds of their motion on which the court did not pass were good, and that if any one of them is sustained the writ of error ought to be dismissed. The conclusion which we have reached on the question of estoppel renders it unnecessary to consider this contention.

The plaintiff in error claimed the land in controversy by devise from one Kahookulimoku, claimed by her to have been one of the heirs at law of Charles Kanaina, who died intestate in Honolulu March 13, 1877, leaving no widow, child, grandchild, parent, brother or sister. There was litigation over the Kanaina estate from 1877 to 1881. A proceeding was brought by certain claimants under Kanaina's maternal grandmother, Moana, and her four husbands, under the act of 1874, to quiet land titles,

resulting in an adjudication of heirs. *Kalakaua v. Parke*, 8 Haw. 623. In a later proceeding the act of 1874 was held to be unconstitutional, and a new decree of heirship was made. *Est. of Kanaina*, *Ib.* 627. In December, 1879, W. C. Parke, administrator of the estate, filed his petition alleging payment of debts, that the real estate remained in his charge, and that certain heirs who had been decreed to own it were unable to agree on a division, but that a majority desired a sale by public auction, praying that an order of notice be published in the English and Hawaiian languages calling upon all interested to appear and show cause and that the lands be sold. An order was made accordingly, the property was sold at auction, the piece in question being bought by Ruth Keelikolani. Her devisee, Bernice Pauahi Bishop, devised the property to five trustees and their successors, the defendants being four of the present trustees. The case as presented by the evidence is as follows: The plaintiff testified that she was living with Queen Emma when Kanaina died; that she knew there was an opportunity for relations to put in their claims to his estate, that the claimants were called to come in and she knew this because it was a matter of importance in those days; that the making of the claims and the disposition thereof were matters of great notoriety; that the matter was known throughout the whole kingdom; that she was well acquainted with all the judges and with the administrator, W. C. Parke; that the trial itself was well known in Honolulu, that she was in Honolulu at the time and heard of the decision, that she remembered Princess Ruth as a claimant and also many other claimants that appeared; that the matter was one of great notoriety because Kanaina held a large estate; that she knew of the sale and that the same was advertised all over the city; that the sale was a matter of great notoriety and publicity; that she knew from the newspapers the day the sale would take place; that she knew at the time of the sale that she was related to Kanaina; that she made no claim because of the instructions of her grandmother that she was not to set up her pedigree as in any way connected with the Kameha-

mechas, but now they were dead she was coming in to claim her rights; that it was through Princesses Ruth and Pauahi Bishop that the Kamehamehas were connected with the matter and she was not going to set up her claim against theirs; that she told no one about her claim; that after the death of Ruth and Pauahi she thought no more of the matter until informed that all the claimants of the estate were going to be shut off; that her relations with Ruth and Pauahi were of a most intimate character; that they had known each other for a great many years; that it was from no fear of Ruth's displeasure or punishment that she did not set up her claim but simply of the admonition of her grandmother that she never told Ruth of her claim; that she made no claim at the hearing; that she did not stop others from making claims but kept hers to herself; that she kept her claim from Ruth because she did not want to set it up against her; that she kept silent on account of the chiefs, (referring to Ruth and Pauahi); that if these chiefs had made no claim against the estate of Kanaina she would certainly have put in her claim, that her conduct was out of respect to those two chiefs, that she knew others had claims to the estate and the relation of all such parties to Kanaina; that her action in regard to not presenting her claim was taken "deliberately, knowingly;" that the heirship to the Kanaina estate was a matter of general talk in those days; that she never informed Ruth of her grandmother's admonition; that it was a rule among Hawaiians that those on a lower level should not set up their relationship to those in higher places; that her reason for finally bringing suit was that she heard that the doors were to be shut; that she then brought suit against many persons, and that she thought nothing about the purchasers at the Kanaina sale and how they would suffer. The plaintiff in her testimony emphatically denied that she intended to deceive or mislead anyone or that other claimants should act without knowledge of her claim. "I did not intend Ruth to infer from my conduct that I was not a claimant. I did not intend that she should infer or not infer, but I simply did not want to set up my claim against hers." The defendants contend that the plaintiff's silence

under all the circumstances equitably estops her from bringing this action. The plaintiff does not question that the defense may be made in an action at law but she denies that equitable estoppel is shown, and claims that at any rate there was uncertainty whether the evidence showed all the elements of estoppel and therefore that the question ought to have been left to the jury. Where evidence is "capable of more than one construction" or of "more than one inference, the jury alone is to determine the meaning to be conveyed, and the inference to be drawn from facts proved where more than one inference may be so drawn reasonably." Perry, J., in *Smith v. Hamakua Mill Co.*, 15 Haw. 655. The rule so stated certainly goes as far as the plaintiff can reasonably ask; but the case has no facts in controversy, no uncertainty as to inferences to be drawn from them. The fact that Ruth Keelikolani and Pauahi Bishop were acquainted with each other and knew each other as kindred of Kanaina does not authorize the inference that either of them knew that the plaintiff was related to him in the remote degree claimed by her. Moreover, the plaintiff would not have hesitated to state her claim to them if they had known or supposed that she was related to the intestate. Coming then to the principal question in the case, namely, whether the plaintiff's conduct was such as to constitute in law a case of equitable estoppel. The plaintiff refers to the elements which are often considered requisite, namely, misrepresentation or concealment of a material fact made to one ignorant of it with the intention that the other should act upon the misrepresentation or concealment, and should thereby have been induced to act. Certainly the plaintiff had no thought to keep back her claim until after years should see such changes that she could make her claim without disrespect of the chiefs; but the consequences to the chiefs and to those who have succeeded them in the supposed ownership of this property were precisely the same as if the plaintiff had intended that her silence should lull them into a sense of security. The royal princesses, Ruth Keelikolani and Pauahi Bishop, were equally with the plaintiff under the law of the land. They were

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as much entitled as any other persons under similar circumstances to be informed seasonably, if ever, of the plaintiff's claim to land which they believed to be their own. The plaintiff's reticence cannot be regarded in any other light than it would be regarded if she had entertained no scruples on the subject of making her claim known. If she had presented her claim seasonably, when cotemporaries of Kanaina were living who could have testified concerning his kindred, evidence might have been forthcoming which is not now available which would have shown that she was not within the inheriting degree of kindred. The doctrine of estoppel "is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title." *Steel v. Smelting Co.*, 106 U. S. 456. Fraud or fraudulent intent is not a necessary element of an estoppel. "There are undoubtedly cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting; as, where one of two innocent parties must suffer from the negligence of another, he through whose agency the negligence was occasioned will be held to bear the loss." *Brant v. Va. Coal Co.*, 93 U. S. 336. "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage or trade or otherwise to disclose the truth, may often have the same effect." *Freeman v. Cooke*, 2 Exch. 654, 663, cited with approval in *Leather Mfgs'. Bank v. Morgan*, 117 U. S. 108. "Culpable" silence which permits another to believe in the existence of a state of things which does not exist "always presupposes error on one side and fault or fraud upon the other and some defect of which it would be inequitable for the parties

against whom the doctrine is asserted to take advantage." *Morgan v. R. R. Co.*, 96 U. S. 720. That was a case in which the plaintiff's land had been used for a railway station to the plaintiff's knowledge, although he made no objection. The court held that his silence was "culpable" and estopped him from claiming the land. In *Kirk v. Hamilton*, 102 U. S. 68, a trustee's sale of land had been ordered by the court, which the plaintiff claimed was invalid. The plaintiff had appeared in the proceedings but had not objected to the validity of the sale. The court held that the sale might have been a nullity, but that the plaintiff had by his conduct indicated his purpose not to object to it, and that his silence when improvements were afterwards placed upon the land estopped him from claiming that the sale was invalid.

The plaintiff claims that "the action of the administrator in the sale of the real estate of Charles Kanaina, deceased, for the purpose of distribution of the proceeds amongst the heirs, was illegal and void. By virtue of such illegal act 'no relation' could spring into existence between the administrator and plaintiff in error acquiescing therein." Numerous cases are cited by the plaintiff to sustain this claim, e. g.:

(1) In *Viele v. Judson*, 82 N. Y. 32, the court, after saying that in estoppel by silence "the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and *apparent duty to speak*; and, in all, the party maintaining silence knew that some one else was relying upon that silence, and either acting or about to act as he would not have done had the truth been told," decided that the case showed that "nobody relied on his" (the plaintiff's) "silence or was misled by it."

In *Rubber Co. v. Rothery*, 107 N. Y. 310, the parties owned on opposite sides of a stream. The defendants' factory, which they were building upon their own land, was to be supplied with water from the stream through a race from a point above. The opposite owner saw that the defendants were building the race and factory, knew that the race was being made in order to take

water from the stream to the factory and did not object. It was held that this silence did not authorize presumption of a grant or license; that the owner had not led the defendants into making the outlay "on any assumption that they had the right to do it when in truth they had not," and that even if the defendants had no right to dig the mill race and let the water into it and thus possibly divert the water from the stream, the owner of the adjoining land was not bound to interfere or protest; that her simple knowledge that the defendants were thus engaged "did not require her to object under penalty of the loss of her legal rights" *under the pretense that the defendants "did not know their title and their rights quite as well as she.* She was simply passive and failed to object to defendants doing what they did. In cases of silence there must be not only the right but the duty to speak before a failure so to do can estop the owner. There was no such duty here."

In *Taylor v. Ely*, 25 Conn. 250, the court held that defendants' refusal to inform the plaintiff concerning the state of their accounts with a third person with whom the plaintiff was dealing did not estop them from afterwards showing that the other person was indebted to them, saying, "To make the silence of a party operate as an estoppel, the circumstances must be such as to render it his duty to speak."

Farist's App., 39 Conn. 150, held that a party was not estopped from presenting a claim against an intestate estate by having assented to a statement by the widow of the intestate that there were no debts against the estate, although *he would have been estopped if she had told him that she was thinking of buying* some land belonging to the estate, and that this was the reason why she wished to know whether there were claims against it.

In *Evans v. Snyder*, 64 Mo. 517, the defendants claimed in ejectment under an administrator's sale, both parties claiming from the intestate. The probate record showed that there was "no order authorizing the sale." Defense was made that the proceeds of the sale had been used in relieving other lands which

the plaintiffs still retained free from debt. The court held that "this latter circumstance, *although the sale was void*, created a clear equity in favor of defendants."

Simmons v. Taylor, 23 Fed. 849, holds that "estoppel implies that the party has done or omitted to do that which *under the circumstances* he was legally or *morally* bound to do or omit doing."

Silence may be interpreted as assent if one "is silent in the face of *facts which fairly call upon him to speak*." *Day v. Canton*, 119 Mass. 518. Mere silence does not create estoppel unless there was some obligation to speak or duty to speak. The plaintiff's conduct was "within his legal rights and *any inference which the appellant might draw therefrom* would not estop the plaintiff from asserting his rights." *Newhall v. Hatch*, 66 Pac. 266. An administrator of two different estates, after having reserved amounts deemed sufficient to pay the debts in one estate and deducting what was owed to that estate by the other, found that there were \$6,000 due to the first estate from the second. He divided that sum in the second estate between the mother and five children. It was afterwards learned that according to law the mother should have received the whole amount, for which she then sued the administrator. His answer was payment as above and that the assets he then held were worthless confederate notes. The court held that the acquiescence of the mother in the payment to her children did not bind her; that a mistake had been made by the administrator; that the mother was under no obligation to inform the administrator as to the law "and her failure to instruct him as to his duties is no breach of any duty on her part. * * * She stood by and said nothing, made no objection *simply because she did not know she had any right to object*." *Davis v. Bagley*, 40 Ga. 181, 2 Am. Rep. 570. "It cannot be that A would be estopped by silence with respect to his title to property which B is about to purchase, *when he has no knowledge that B contemplates buying and B has no knowledge that A is connected with the property*. We know of no case holding that a man is estopped by silence as against the

public, or any particular person with whom he has no fiduciary relation." *Wiser v. Lawlor*, 189 U. S. 260.

None of the foregoing cases go to the extent claimed by the plaintiff. We have italicized in order to draw attention to certain features in the cases, which require no further comment. In some instances the court apparently states the doctrine of estoppel in pais more broadly than is required or justified by the facts, illustrating the difficulty of laying down "any determinate legal test which will reconcile the decisions or will embrace all transactions to which the great principle of equitable necessity wherein it originated demands that it shall be applied." *Preston v. Mann*, 25 Conn. 127. Under all the circumstances of the present case, including a public sale under semblance or color of right by judicial order, the plaintiff, knowing that the sale was so ordered and when it would take place, and that she had an opportunity and the right to present her claim at the time, there were "both the opportunity and *apparent* duty to speak."

The defense of estoppel is sustained and the writ of error is dismissed.

E. C. Peters for plaintiff.

Kinney, McClanahan & Cooper; S. H. Derby and Holmes & Stanley for defendants.

W. S. WISE AND H. L. ROSS v. TONG ONG, LAU ON,
YOUNG KAT, LING KIT AND LUNG YEN.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JANUARY 3, 1905. DECIDED JANUARY 31, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

JURORS—not disqualified by reason of regarding white men more credible than Chinese.

A juror had said on his voir dire that he knew the plaintiffs; had seen one of the defendants in plaintiffs' office but had no acquaintance with him or the other defendants. In answer to the question, "Is this acquaintance with the plaintiffs such as would affect you where there was a dispute in the testimony as to which you would believe," he said "I would believe a white man before I would believe those fellows," (pointing to defendants). The other juror having said that he knew the plaintiffs, that his acquaintance with them was not such as to incline him in their favor, but thought that he would be "governed by the evidence and did not think he would be biased," was asked "Is there anything in your acquaintance which would incline you to give more credence to their testimony" (referring to plaintiffs) "than to the testimony of the others" (referring to defendants) "especially Chinese," said, "Well, I think I would; yes." Held: Following *Queen v. Leong Man*, 8 Haw. 339, that the jurors were not disqualified by reason of bias or prejudice against the defendants personally.

Id.—evidence.

Evidence was properly admitted to the effect that the witness' clients engaged one of the plaintiffs to represent their interests in Honokaa and expressly requested the witness to act for them; that he gave his clients directions to employ the plaintiffs, advising them to "take the step we had decided upon," etc., and that the

"understanding as a result of that conference was that Mr. Ross of the firm of Wise & Ross was to look after the interests of the five defendants at Honokaa."

OPINION OF THE COURT BY HARTWELL, J.

This was an action brought before the district magistrate of South Hilo, Island of Hawaii, on a claim of \$75 for services performed by the plaintiffs for the defendants. The defendants appealed to the circuit court from a judgment in favor of the plaintiffs rendered by the magistrate. The plaintiffs' evidence tended to show that they were engaged by the defendants to defend them in a case and to charge a reasonable fee therefor in addition to what had been charged for previous work. This was denied by the defendants. The jury returned a verdict for the plaintiffs for the sum claimed and the case comes to this court upon the defendants' exceptions. The exceptions mainly relied upon were to the ruling of the trial judge allowing two jurors to sit at the trial of the case, one of whom, when examined on his voir dire, said he knew the plaintiffs; that he had seen one of the defendants in the plaintiffs' office, but had no acquaintance with him or with the other defendants, and in answer to the question, "Is this acquaintance with the plaintiffs such as would affect you where there was a dispute in the testimony as to which you would believe," answered, "I would believe a white man before I would believe those fellows," (pointing to defendants). The other juror having said on his voir dire that he knew the plaintiffs; that his acquaintance with them was not "such as to incline him in their favor," but that he thought he would be "governed by the evidence and did not think he would be biased," and when asked, "Is there anything in your acquaintance which would incline you to give more credence to their testimony" (referring to plaintiffs) "than to the testimony of the others" (referring to defendants) "especially Chinese," said, "Well, I think I would; yes." The competency of a juror who says that he would give more credence to the testimony of persons of one race than those of another was discussed in *Queen v.*

Leong Man, 8 Haw. 339 (1892). In that case a juror when asked, on the voir dire, "Do you believe that under our form of oath Chinamen are equally to be credited with a native Hawaiian or white man?" answered, "No, they are not." In answer to inquiry by the court the juror said: "I think I could try a case where there is Chinese testimony and weigh the evidence without prejudice if it had the impress of truth, but I have more confidence in a native's or white man's veracity. When a Chinaman is interested I have not equal belief in their veracity," adding "I would not throw out the testimony because the witness was Chinese. I would have less confidence in any witness interested than in one not interested. I could have nearly equal confidence in native or Chinese evidence if interested. Upon this the court said: "A juror to be impartial is not obliged to say that he will give equal credence to every witness that testifies, and when a juror says that where there is Chinese testimony he will weigh the evidence without prejudice if it has the impress of truth and would not discredit it because it was Chinese, he is not disqualified." It appeared further that the defendants' counsel might have challenged the juror peremptorily and did not do so. The court held that the juror was not disqualified, apparently basing its opinion to some extent upon the doctrine that "an erroneous overruling of an objection to a juror avails nothing to the defendant if he does not finally exhaust his peremptory challenges." That decision appears to control the present case.

In *Com. v. Poisson*, 157 Mass. 510, the trial judge declined to allow the following questions to be put to jurors: (1) "Have you any prejudice or bias against the sale of liquor that would prevent you from giving the same weight to the testimony of a person engaged in the sale of liquor, or who had been engaged in such business, that you would give to any other witness, so far as the occupation or trade of a witness would affect his credibility?" (2) "Have you any bias or prejudice against a person accused of the unlawful sale of liquor, and against whom some evidence has been offered tending to prove the

offense, that would prevent you from giving to the testimony of the accused the same weight that you would give to any other person accused of an offense, and against whom some evidence had been offered?" The court, Holmes, J., after remarking that "examination of jurors as to interest or bias in the cause * * * beyond the inquiries provided for expressly by the statute, was left to the discretion of the presiding judge," that "it would be unfortunate if all control of such an examination should be taken from the court," and that the statutory power of parties to examine witnesses "is in terms to make it under the direction of the court," held that the discretion "is exercised wisely by not going beyond the usual questions, unless something appears which makes it proper to go further." The court regarded the questions which the defendant wanted to have asked as going beyond those suggested by the statute without any manifest reason. "If a juror," said the court, "should admit that he regarded as more or less discredited a witness who, so far as the evidence had gone at the moment of his testifying, appeared probably to be a liquor seller, the admission would go only to the juror's general opinions concerning circumstances which affect the value of evidence. It is to get the benefit of such opinions formed by men of the world that jurors are summoned. It seems to us that the existence of such a one as we have supposed would not prevent the juror from standing indifferent in this particular case." In *Com. v. Porter*, 4 Gray 423, the defendant requested the court to ask the jury if "they had formed and expressed an opinion as to the credibility of one Boyd Howard, one of the witnesses by whom the government proposed to prove the offense charged." It was held that the judge properly declined to put the question. "The inquiry was novel, and, if competent, would certainly be a great relief to persons indicted, who are anxious not to be tried; for just in the degree that the character of the witnesses to be called was well known and respected, would the objection prevail. If the witness happened to be an individual known and revered by all his fellow citizens

as a man without reproach, every member of the panel would have formed an opinion as to his credibility." *Ib.*

In *Balbo v. People*, 80 N. Y. 484, the prisoner who was on trial for murder was an Italian. A juror, in answer to a question whether he had any prejudice in favor of or against the Italians as a race, said that it was "a race that he was not particularly fond of and did not think much of, judging from those we have here." The juror in response to questions of the court said that he did not suppose that any opinion he had would bias, influence or prejudice him in any manner in the consideration of the evidence. The prisoner having been convicted, the court upon exceptions held: "The fact that the juror may have had some prejudice against the Italian race was not, we think, a disqualifying circumstance. An opinion that the prisoner's character was bad is not a ground of principal challenge," (citing 1 N. Y. 379: 43 *Ib.* 28). "The fact that the juror did not like the race to which the prisoner belonged was quite too inconclusive to justify a finding that he was incompetent." *Ib.* 498. At a trial of a negro on a criminal charge jurors on their voir dire had said that they had prejudices against negroes; that they thought a white jury more competent to give the prisoner justice than a negro jury and that it was their opinion that the country would be better off without the negro, and that the colonization of the negroes was desirable. "These questions were all hypothetical and had no relation whatever to the case on trial. The jurors did not say that they had any prejudice against the accused or that they could not give him a fair trial." *State v. Casey*, 44 La. 970. In testing the qualification of jurors on the voir dire it is not a proper field of inquiry to interrogate a proposed juror as to the comparative credence that he would give to the evidence of persons belonging to the different races. *Jenkins v. State*, 31 Fla. 196, 12 So. Rep. 677. It is always the case that a trial judge can tell better whether a juror is biased or not than the appellate court can do. A juror's tone and manner would have much to do with indicating whether he had personal feeling for or against the parties, hence it is proper to leave con-

siderable discretion to the trial judge in passing upon the qualifications of jurors in respect of bias or prejudice. It is not apparent that either of the two jurors entertained personal feeling of prejudice or ill will towards the defendants. We construe the answer of the first juror that he "would believe a white man rather than those fellows" as indicating his belief in the general superiority of white over Chinese testimony. We do not think that this general mental attitude disqualifies a juror. The defendants' attorney refrained from asking the juror whether he would be biased or prejudiced by thinking that the testimony of the plaintiffs would be the more credible. It is not requisite for the impartiality of a juror that he consider all races and nationalities on a par in respect of habits of veracity. In order that an impartial trial may be had it is not requisite that jurors regard the parties as equally worthy of credence. Trial by jury of witnesses is a thing of the remote past; but an important object of trying causes in the vicinage is that jurors are likely to know the general character of parties and witnesses as well as general conditions applicable to cases before them. If such general acquaintance does not go to the extent of biasing or prejudicing it does not disqualify but enables jurors to give due weight to testimony. For instance, most persons resident in any community have a general reputation for truthfulness or the reverse. Jurors having knowledge, as they are likely to have, of such general reputation are not therefore to be rejected. There is reason why character should tell, as it assuredly does tell when public charges are made or controversies arise which affect life, liberty, property or good name. The second juror in this case said on his voir dire that he would give more credence to the testimony of the plaintiffs than of the defendants, but that he would be governed by the evidence and did not think he would be biased. The burden is upon the defendants to show more fully than they have done that the juror had prejudice against the defendants personally. Under the ruling in *Queen v. Leong Man*, ubi supra, we do not think that on the showing made either of the two jurors was disqualified.

The defendants' remaining exceptions, on which they rely in their brief, are to rulings which allowed a witness for the plaintiffs to testify in substance that the defendants as his clients engaged Mr. Ross to represent their interests in Honokaa and that they expressly requested the witness to act for them; that he gave his clients directions in regard to the employment of Wise & Ross to look after their interests in Honokaa, advising them that they "take the step that we had decided upon, having one to bear the brunt of the charge and pay the fine of \$250 and Mr. Wise or Mr. Ross was to go to Honokaa to arrange that with the court at the Honokaa term in order to save the expense of the defendants going to Honokaa," and that the "understanding as a result of that conference was that Mr. Ross of the firm of Wise & Ross was to look after the interests of the five defendants at Honokaa." The appellants claim that this was permitting the witness to "tell the jury as a conclusion of law and fact that defendants and plaintiffs had an understanding, the result of which was a contract of employment."

We think the evidence was not objectionable. The exceptions are overruled.

Carl S. Smith for appellants.

The appellees pro se.

K. N. KEKAI AND LILIANA KEKAI (HIS WIFE) *v.*
WAIPIO LIMALAU, LIMITED, A CORPORATION.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED JANUARY 4, 1905. DECIDED JANUARY 31, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

DISAFFIRMANCE OF AN INFANT'S LEASE—*none necessary prior to bringing ejectment by his heirs.*

An infant having leased his land to the defendant and died in minority, an action of ejectment by his parents being his heirs at law is sufficient disaffirmance of the lease.

OPINION OF THE COURT BY HARTWELL, J.

This was an action of ejectment in which the plaintiffs claimed as heirs at law of an infant lessor under whom the defendant held, and who had died in minority. The court directed a verdict for the defendant on the ground that before bringing the action the plaintiffs had done no act amounting to a disaffirmance of the lease, to which direction, as well as to the verdict, the plaintiffs excepted. It was held in *Tucker v. Moreland*, 10 Peters 72, that "where the act of an infant is by matter of record he must avoid it by some act of record (as for instance by a writ of error or an audita querela) during his minority, but if the act of the infant is a matter in pais it may be avoided by an act in pais of equal solemnity or notoriety." In that case one Barry had executed a conveyance in fee to one Wallach dated December 1, 1831, being at the date of the deed under the age of twenty-one years. He continued in possession, however, of the premises conveyed until February 8, 1833, when

he became of age when he conveyed the land to the defendant. The question before the court was whether the second conveyance was a sufficient disaffirmance of the first. The court said: "We do not mean to say, that in all cases, the act of disaffirmance should be of the same, or of as high and solemn a nature as the original act; *for a deed may be avoided by a plea*. But we mean only to say, that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency. * * * The question, then, is, whether, in the present case, the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach, is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance, which had passed the seisin and possession to Wallach, and he had remained in possession, it might, like a feoffment, have been avoided by an entry by the infant, after he came of age. But in point of fact, Barry remained in possession; and therefore, he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, if the same had been in an adverse possession."

We think that the action of ejectment by the infant's heirs was a sufficient disaffirmance on their part of the lease made by their son during his minority. The only thing which the defendant could have gained by any more solemn act of disaffirmance of the lease by the plaintiff would be the saving of costs of defending the action. This they could have done by disclaiming title.

The exceptions are sustained, the judgment entered is reversed, the verdict set aside and the cause remanded to the circuit court for further proceedings.

Le Blond & Smith for plaintiffs.

Carl S. Smith for defendant.

M. V. SILVEIRA *v.* L. AHLO.

PETITION FOR REHEARING.

SUBMITTED JANUARY 9, 1905. DECIDED JANUARY 31, 1905.

FREAR, C.J., HARTWELL AND HATCH, JJ.

REHEARING.

A rehearing is granted upon a ground duly presented by counsel and not duly considered by the court.

OPINION OF THE COURT BY FREAR, C.J.

(Hartwell, J., dissenting.)

The defendant asks for a rehearing in this case (decided ante p. 309) upon the ground "that questions decisive of the case were duly submitted by counsel and overlooked by the court" and "specifies the particular matters on which he relies" as follows:

"1st. That one of the questions in the case on which he relied and which he duly presented was that no rent could be recovered after the first day of June, A. D. 1900, because that the plaintiff on that date granted a reversion in the premises leased to one J. P. Mendonca by lease in praesenti, and that by operation of law the right to recover the rents thereupon passed to said Mendonca and that the plaintiff could not recover from said date;

"2nd. In case the rent did not pass with the reversion still no recovery could be had because the landlord having re-rented the premises the amount received on the Mendonca rent, being larger than the amount sued upon, should be applied on the amount due from the defendant, and no recovery could be had after that date;

"3rd. That the instruction of the Court that the issue in the case was whether the lease had been surrendered and can-

celled, was misleading, the witness Bolte having testified that the lease was to be cancelled before it was surrendered, but the case which was submitted to the jury under the instructions of both parties was a case of a surrender by operation of law and not the surrender testified to by Bolte, and that the instruction given by the Court of its own motion, duly excepted to, stating to the jury that the issue was whether the lease was surrendered and cancelled was misleading, and that whilst duly presented by counsel it has been overlooked by the Court."

There appears no reason for granting a rehearing upon the second and third grounds, but we think there should be a rehearing upon the first ground.

The action is one for rent, and one question is whether the plaintiff can recover rent from the defendant after having made an overlease to one Mendonca. Two exceptions are brought here bearing upon this point. One is an exception to refusing to give an instruction to the jury, and the other is an exception to the admission in evidence of a paper signed by Mendonca, in which he certifies that he is aware of the fact that the pieces of land covered by his lease are now under the leases (describing them) to the defendant; and further certifies that the said lease to him "was granted subject to the aforementioned three leases" to the defendant.

Our attention was directed particularly to the second of these exceptions, and the opinion of the court, so far as it bears upon this document relates to the question of its admissibility and of its bearing upon the question of surrender which also was involved in the case. The question raised by the exception to the refusal to give the instruction received little or no attention by us and is not referred to in the opinion. Defendant's brief was perhaps a little blind upon these questions, but on the whole, after further examination, we are of the opinion that both questions were duly presented and that the question of the effect of the document mentioned was not given due attention. Accordingly a rehearing is granted upon the first ground stated in the petition, which may be stated in the form of the following questions: (1) Would the words "subject to the aforementioned

three leases" in a grant of a reversion (either by a deed which does or by a deed which does not, expressly or by implication, contain a warranty of title or right to convey) prevent the subsequently accruing rent from going with the grant? (2) If so, are there any facts in the present case which would prevent the new lessee, Mendonca, from being entitled to such rent?

Robertson & Wilder for plaintiff.

Castle & Withington for defendant.

DISSENTING OPINION OF HARTWELL, J.

By the law of real property the grant of a reversion which does not reserve to the grantor the subsequently accruing rent from existing leases of the land carries with it the rent as one of the incidents of ownership of the land, something in the nature of rights, easements, privileges and appurtenances belonging to and going with the land. The grantee in such case becomes the landlord of the tenants holding such outstanding leases and upon notice of the transfer of the title given to the tenant either by the grantor or by the grantee the latter becomes entitled to the subsequently accruing rent. Until such notice the tenant may pay the rent to the grantor, his immediate landlord, and such payment protects him against any claim thereto by the grantee. After such notice he is released from obligation to the grantor created by the lease in respect of the payment of rent, while the grantor is released from obligation under the lease to the tenant, excepting such liability as may have been incurred by him in consequence of a breach of an express or implied covenant of title.

Such being the law, conveyances of land would be subject to its provisions and requirements, whether therein expressed to be so or not, although a conveyance which does not mention that it is made subject to existing leases would be regarded as giving the grantor the right to take immediate possession of the land and as implying that at the time of delivery of the deed the grantor was himself in possession having the right to place

his grantor on the land. If a conveyance of land in fee contain an express covenant or words which imply a covenant on the part of the grantor that he is in possession and has a right to give possession to the grantee the expression in the conveyance that it is made subject to certain leases would modify such expressed or implied covenant, and would mean nothing more than to release the grantor from an obligation to give immediate possession to the grantee.

As between grantor and grantee the same thing could be effectively shown and accomplished by a written statement by the latter to the former or by a separate written agreement between the two to the effect that the grantee took the conveyance "subject to" existing leases. It might be a question perhaps whether the using of a separate instrument to accomplish this object would properly be regarded as showing an intention on the part of the grantor and grantee to accomplish any more than this object. The above rules apply as well to a grant by a lessor of a longer term of lease than one which is already made and which is still unexpired. The new lessee would have the same relation as a grantee would have to the earlier lessee.

In the present case the lessor, the plaintiff Silveira, made to J. P. Mendonca a lease for a longer term than his outstanding leases to the defendant Ahlo, and at the date of Mendonca's acknowledgment of the lease to himself he gave to the plaintiff his written statement to the effect that he knew of the Ahlo leases and took his own lease subject to them. Neither Mendonca nor Silveira informed Ahlo of the transaction or notified him that Mendonca would claim or be regarded by himself or by Silveira as entitled to subsequently accruing rent. After the execution of the lease to Mendonca, Silveira by his agent Bolte, who was also agent of Mendonca, continued to demand of Ahlo the rent on the Silveira leases. The lease to Mendonca was placed on record but his written declaration was not recorded. Bolte's continuing to demand of Ahlo rent upon the Silveira leases to him may in the absence of evidence to the contrary be presumed to have been done in conformity with the understand-

ing between Silveira and Mendonca as to the meaning of the written declaration of the latter. As the claim of rent from Ahlo was a matter solely between Silveira and Mendonca, they had a right as between themselves to place this meaning, if they wished to do so, upon Mendonca's declaration, although it may not be the meaning which in the absence of construction of it by the parties the law would place upon it. Payment of rent by Ahlo to Silveira would have protected him from a claim by Mendonca, and a payment now made in the absence of any claim by Mendonca would seem to protect him against the latter. On the other hand, a payment of the rent to Mendonca made by Ahlo would protect him from a claim by Silveira, on the theory that unless otherwise notified by Silveira, Ahlo would have had the right to treat the declaration as merely a statement of the general rule of law applying to conveyances made subject to existing leases. The law and the facts in this case were fully before the court as far as I can say and were fully recognized and considered in its decision of which the defendant asks rehearing. It is true that the question argued by the defendant concerning Mendonca's written declaration was confined to its admissibility, and that the conclusion of the court necessarily went to the extent, not only of declaring it to be admissible, but of passing upon its effect in law as equivalent under the circumstances of the case to an agreement between Silveira and Mendonca that the latter, until he got possession of the land leased to Ahlo, would not claim the rent from Ahlo. As far as I know or can infer, this construction was placed upon the written declaration deliberately and without ignoring or failing to give full consideration to the law upon the subject.

I therefore respectfully dissent from the opinion of the court ordering a rehearing of the decision. I do this with unfeigned respect for the opinion of my colleagues and with a feeling of satisfaction that in this case, as heretofore, we have no difference of opinion concerning rules of law, the only question now being whether there is anything in the case which shows that the lease to Mendonca was not to give him the right to subsequently

accruing rent while he should not have got possession of the land then held under the Ahlo leases. As the court, according to its majority opinion, have considered that a re-argument on this matter is proper, I shall take great pleasure in listening to and considering the argument which may be presented.

KAPIOLANI ESTATE, LIMITED, *v.* L. A. THURSTON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED JANUARY 3, 1905. DECIDED FEBRUARY 20, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE MATTHEWMAN IN PLACE OF HATCH, J.

EJECTMENT—evidence—marriage—estoppel—adverse possession.

The administrator with the will annexed of the Estate of Kalakaua (from whom the plaintiff in the present case claimed title) retained counsel to defend an action of ejectment by one Oku against Cummins, Kalakaua's lessee. Held: Evidence of the defense of the action at the instance of the administrator was inadmissible for the purpose of showing that Kapiolani, the devisee of Kalakaua, was estopped by the judgment in the case against Cummins.

The plaintiff in this action introduced evidence that one Oku was married to one Kahoopulpoi at Ewa in February, 1861, by Rev. A. Bishop, who gave them a certificate of marriage which was lost. The defendant offered in evidence a marriage record kept by the clergyman mentioned for a term of years including the year 1861, and which had no record of the marriage. Whether the record is admissible for the purpose of disproving the alleged marriage, *quaere*.

Certain deeds executed by Kahoopulpoi and one Keawe as husband and wife were properly admitted in evidence to rebut the disputed evidence of a ceremonial marriage of Kahoopulpoi to another man.

Conveyances and mortgages made by Kalakaua and Kapiolani and by the trustees of Kalakaua were improperly admitted as evidence to rebut defendant's evidence of adverse possession, and on that ground a new trial is ordered.

OPINION OF THE COURT BY HARTWELL, J.

This was an action of ejectment, the defense being a general denial with notice of intention to set up by way of defense the statute of limitations, illegality and fraud. The verdict was for the plaintiff, the defendant alleging exceptions. The following is the statement of the case made in the brief of the defendant which, according to the brief of the plaintiff, "sufficiently states the preliminary facts in this case."

"The stipulation of the parties admitted a common source of title in one, Kahoopuipui; the difficulty has arisen from her having too many putative husbands. The plaintiff claims through a deed from Kahoopuipui to Kalakaua, dated June 20, 1874, and thence by his will, admitted to probate March 5, 1891, devising his estate to Kapiolani; Kapiolani conveyed to David Kawananakoa and Jonah Kalaniana'ole February 10, 1898, from whom by mesne conveyances the property came to the plaintiff. The defendant claimed that the deed to Kalakaua was ineffective on the ground that Kahoopuipui was married to one Oku at the time of the execution of said deed and that Oku survived her, inheriting the property and executed a deed, dated the 17th day of May, 1895, to Leialoha Ai, his niece. This deed was excluded by the court but it was shown that Leialoha Ai was the only heir of said Oku, who deceased in 1895. A conveyance was further shown from Leialoha Ai and W. R. Castle, as her trustees, with covenants of warranty to the defendant, L. A. Thurston. To establish the fact of the marriage of Oku and Kahoopuipui there was admitted in evidence the record of an action in the supreme court of the kingdom between Oku as plaintiff and one, J. A. Cummins, as defendant, for a piece of land at Waimanalo, tried at the April term of 1892 before Chief Justice Judd for a portion of the premises included in the deed from Kahoopuipui to Kalakaua. The pleadings and records in that case were introduced and also, by consent, the manuscript notes of Chief Justice Judd taken at the trial of the proceedings

and evidence. The issues in that case were whether Oku was or was not married to Kahoopuipui in Ewa, in February, 1861, by the Rev. A. Bishop, who gave them a certificate of the marriage. Several witnesses present at the marriage testified to this, all are now dead. The plaintiff in that case accounted for the loss of the certificate by showing that the King, in October, 1890, tore up the marriage certificate with other of Oku's papers. To this several witnesses testified in that trial and corroborated at the present trial. Another issue was whether Oku was estopped by taking a lease from the King and making statements to Cummins, or in his presence, upon which Cummins relied in taking the lease, that he and his wife had given the land to the King. Upon the first issue the plaintiff introduced the Rev. Dr. S. E. Bishop, who produced a book of marriage records, also offered at the present trial to show the non-existence of any entry on this record of such a marriage. Another issue, akin to one already referred to, was whether the relations of Oku to the King were such that the acts in taking a lease, and otherwise, of Oku were such as could constitute admission of title in the King, or, as Chief Justice Judd held it, whether Oku acted under duress. The defendant, in addition to the record above referred to, offered evidence of adverse possession in Oku and his successors for more than the statutory period, and on the cross-examination of the witnesses of the defendant considerable evidence was adduced of reputation, declarations and conduct sufficient to support a finding that Oku and Kahoopuipui were man and wife at the time of the execution of the deed to Kalakaua. The evidence of Mr. Justice Hatch was also offered, who appeared as one of the attorneys for the defense in the suit of *Oku v. Cummins*, that he was not employed by the defendant in that action but by the landlord, Kalakaua being dead, by the administrator in the interest of his estate or heir. He testified that he had no direct communication with Kapiolani, who was the sole devisee of Kalakaua, but that he received his instructions from Dr. Trousseau who was the administrator with the will annexed, but that he understood that he was acting for the landlord and not for the administrator. The exact language of Judge Hatch in answer to the court is (trans., p. 24): "The present representative, Judge, retained me to defend the interest of the landlord, i. e., the estate. The present representative was not directly interested as an adminis-

trator. I was retained to represent the interests of the heir, the landlord.' Upon the production of a letter from Cummins to Trousseau demanding that he should defend the action, the court, on motion of the plaintiff, struck out the evidence of Judge Hatch. Subsequently, in the trial, Mr. W. R. Castle testified that in the interest of Leialoha Ai, the grantee and devisee of Oku, he saw Kapiolani, talked with her about the matter, found that she knew about the Cummins and Oku suit and she said to him that she had no further interest in the land. The defendant thereupon moved to set aside the ruling striking out the evidence of Judge Hatch which motion was denied. The plaintiff in rebuttal introduced evidence of reputation that the marriage relation existed between Kahoopuipui and one Keawe early in 1874 and also certain deeds executed between 1870 and 1874, signed by Keawe and Kahoopuipui. No evidence of any ceremonial marriage was offered or anything directly tending to show such a ceremony of marriage. The plaintiff also put in evidence the records of the trustees, under a mortgage from Kalakaua and their rent roll for the purpose of showing that Oku leased the land in question and other lands of said trustees. These instruments were admitted over the objection of the defendant; also a mortgage made by Kapiolani in 1892 for the purpose of rebutting evidence of adverse possession, which was also admitted over the objection of the defendant."

The questions presented in the case, as stated in the defendant's brief, are: "First: Did the court err in striking out the testimony of Mr. Justice Hatch? Second: Was it error to admit the marriage record of the Rev. Mr. Bishop? Third: Were the deeds, in which Kahoopuipui and Keawe purported to join as husband and wife, properly admitted to rebut the evidence of a ceremonial marriage furnished by the case of *Oku v. Cummins*? Fourth: Did the court properly admit the evidence of conveyances and mortgages made by Kalakaua and Kapiolani and the records of the trustees of Kalakaua's mortgage in order to rebut adverse possession?"

(1) The evidence of Mr. Hatch showed that Dr. Trousseau, the administrator with the will annexed of Kalakaua, retained him to defend, and he did defend the action of ejectment by Oku against Cummins, Kalakaua's lessee. There is

no privity at common law between the executor and the devisee "so as to make a judgment against the decedent's representative binding upon the lands of the heir or devisee." Bigelow on Estoppel, 98. One reason for this is that the executor neither represents the land nor the devisee unless (as does not appear in this case), the will imposes upon him some charge or duty concerning the land. The evidence, if admissible at all and not controverted, would be conclusive evidence that the devisee was estopped by the judgment in that case. We are not prepared to accept that view of the law and we therefore hold that the evidence was properly ruled out.

(2) The record of marriages among the parishioners at Ewa, kept by the Reverend Artemas Bishop, appears to have been properly authenticated and would seem to be admissible evidence of marriages therein recorded. The cases cited by the plaintiff fully sustain this view, but whether the record was admissible for the purpose of disproving the alleged marriage we do not now determine.

(3) We do not sustain the contention of the defendant against the introduction of the deeds in which Kahoopuipui and Keawe represented themselves to be husband and wife. Cases are not in point holding that direct and undisputed proof of marriage is not invalidated by evidence that either of the parties had formed illegitimate relations. In this case the thing sought to be proved by the defendant was a marriage between Kahoopuipui and Oku. We cannot assume that the evidence offered to sustain that claim was indisputable.

(4) The conveyances and mortgages made by Kalakaua and Kapiolani and the records of the trustees of Kalakaua were evidence of claim of ownership and acts of ownership, and the recording of them was notice of the claim; but they do not tend to show actual possession, nor could they affect in any manner evidence of actual possession under claim of right. Therefore these written instruments ought not to have been admitted in evidence.

Upon the fourth ground above mentioned the exceptions are sustained and a new trial is ordered.

Kinney, McClanahan & Cooper for plaintiff.

Castle & Withington for defendant.

IN THE MATTER OF THE APPLICATION OF JOHN
D. SPRECKELS AND ADOLPH B. SPRECKELS,
PARTNERS UNDER THE NAME OF JOHN D.
SPRECKELS BROTHERS, FOR A WRIT OF MAN-
DAMUS AGAINST THE HONORABLE JOHN T.
DE BOLT, FIRST JUDGE OF THE FIRST CIR-
CUIT.

ORIGINAL.

ARGUED JANUARY 7, 1905.

DECIDED MARCH 6, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF HATCH, J.

JUDGE DISQUALIFIED—*from sitting on new trial by reason of having given previous judgment, may sit on motion for change of venue.*

Section 84 of the Organic Act, which provides that "no judge shall sit on an appeal, or new trial, in any case, in which he may have given a previous judgment," does not prevent a circuit judge who had ordered a nonsuit, which was set aside by the supreme court, from entertaining a motion for a change of venue based on the ground that an impartial jury cannot be obtained in the circuit in which the action is spending.

MANDAMUS—*requiring judge of circuit to which venue has been changed to hear case.*

Mandamus lies to compel a judge of a circuit to which the venue has been changed to hear the case, after such judge has declined to hear it upon the erroneous view that the judge of the

circuit in which the action originated was disqualified, by reason of having given a previous judgment in the case, from ordering a change of venue to another circuit the judge of which had ordered a further change of venue to the circuit in question.

OPINION OF THE COURT BY FREAR, C.J.

This is an application for a writ of mandamus to compel the first judge of the circuit court of the first circuit to try an action of ejectment brought originally in the fourth circuit by Charles A. Brown against the petitioners herein and certain others. At the second trial in the fourth circuit, the first trial having resulted in a disagreement of the jury, a nonsuit was ordered—which was set aside upon exceptions to the supreme court. Afterwards, upon petitioner's motion, supported by affidavits alleging the impossibility of securing a fair trial in that circuit, the judge of that circuit ordered a change of venue to the third circuit. In the third circuit, after a mistrial resulting from a disagreement of the jury, a change of venue to the first circuit was ordered in accordance with a stipulation of the parties. In the first circuit, after a mistrial before the second judge resulting from a disagreement of the jury, the case was assigned to the first judge, who, when the case was called in its order, refused to proceed with the trial or set the case for hearing on the ground, then presented for the first time by the plaintiff in said action, that the judge of the fourth circuit was disqualified from ordering a change of venue by reason of having given the judgment of nonsuit in the case and that therefore the said order was void and that all subsequent proceedings in the third and first circuits were likewise void.

If the judge of the fourth circuit was disqualified, it was solely because of the provision in section 84 of the Organic Act that "no judge shall sit on an appeal, or new trial, in any case, in which he may have given a previous judgment." If this provision applies at all in this instance, doubtless the order of the fourth circuit judge changing the venue was absolutely void and not merely voidable. Although at common law an

order of a disqualified judge was only voidable, the great weight of authority under constitutional and statutory provisions is to the effect that such an order is void. This is on the ground that the due administration of justice is a matter of public interest and not merely a matter of interest to the parties engaged in the particular case. Whether the order changing the venue from the third circuit to the first circuit by a judge who was not disqualified and in accordance with a stipulation of the parties was also absolutely void, and whether the parties would be estopped under the circumstances from setting up that it was void, need not be decided. The fact that the third judge of the first circuit was present in the fourth circuit to hear cases generally, whether in the circuit court or before the circuit judge at chambers, in which the judge of the fourth circuit was disqualified at the time when the latter ordered the change of venue to the third circuit, would not deprive the judge of the fourth circuit of jurisdiction to make such order if he was qualified to make it in the absence of such substitute judge.

In our opinion the judge of the fourth circuit was not disqualified to make the order now complained of for the reason that the provision of the Organic Act above quoted does not apply in this instance. That provision is not like the other provisions set forth in the same section of the Organic Act disqualifying a judge from sitting in a case at all by reason of relationship or interest. It is confined to sitting "on an appeal or new trial" in a case in which the judge has given a previous judgment. Sitting on a motion for a change of venue is not sitting on an appeal or new trial. Doubtless this provision should be construed liberally with a view to carrying out its spirit, and yet its spirit as well as its letter would not, as it seems to us, prevent a judge who had sat at a trial in a case from afterwards sitting on a motion for a change of venue based on the ground that a fair jury could not be obtained for the trial of the case in the circuit in which it was pending. Even when the disqualification arises from relationship or interest it does not extend to merely formal or non-

judicial acts or preliminary matters tending to prepare the case for trial. Whether a change of venue is such a preliminary matter may be a question. In several cases the view seems to have been taken, with or without the aid of statute, that a change of venue may be ordered by a judge disqualified to try the case. See *Cock v. State*, 8 Tex. App. 659, 666; *Estate of White*, 37 Cal. 190; *Richardson v. Boston*, 1 Curt. (U. S.) 250. But, however that may be, the provision now in question is an artificial provision extending not to all matters in the litigation or in the case but only to appeals and new trials, and cannot be given the same broad effect that might be given to a provision in regard to the natural disqualifications of relationship and interest applicable to the entire cause. In the absence of special constitutional or statutory provision to the contrary it is not unusual for judges to sit on appeals and new trials in cases in which they have given previous judgments. Not only is it true that a motion for a change of venue is not an appeal or new trial but no question raised on the motion in this instance had previously been passed upon by the judge who heard the motion.

That the provision in question does not apply in the present case would seem to appear not only from the language of the provision itself but also from the decisions in this jurisdiction and other jurisdictions under the same or somewhat similar provisions. The original provision in this jurisdiction, so far as we are aware, is Article 92 of the Constitution of 1852, which reads: "No judge or magistrate can sit alone on an appeal or new trial, in any case on which he may have given a previous judgment." This appears again as Article 72 of the Constitution of 1864, and, with the change from "can" to "shall," as Article 72 of the Constitution of 1887, and, with the further change from "on" to "in" before "which" and the omission of the word "alone," as Article 88 of the Constitution of 1894. A portion of section 820 of the Civil Code of 1859 read: "Neither shall any judge sit alone on an appeal, or new trial, in any case in which he may have given a previous judg-

ment." Under the former provisions, in which the inhibition was against sitting "alone," it was held that a member of the supreme court could sit with the other members on exceptions or appeals taken from rulings made by himself: *The King v. Paakaula*, 3 Haw. 30; *Estate of Banning*, 9 Haw. 354; or sit alone with a jury on an appeal from a decision rendered by himself at chambers: *Unauna v. Kaapokalani*, 4 Haw. 431; although he could not sit alone, jury waived, on such an appeal: *Hing Yee v. Chung Wa*, 6 Haw. 304. Under the present provision it has been held that a circuit judge may sit on a petition for the revocation of the probate of a will previously admitted to probate by himself: *Estate of Opae*, 10 Haw. 188; or preside over a jury on the second trial of a case where on the first trial there was a disagreement of the jury: *Boyd v. Gandall*, 11 Haw. 322; or sit in an equity case remanded to him for taking evidence on an issue raised by an amendment to the pleadings made after the close of the original hearing: *Hitchcock v. Judge*, 14 Haw. 3; also that a justice of the supreme court may sit on an appeal in a habeas corpus case brought to obtain the release of a prisoner held under a sentence pronounced by such justice when a circuit judge: *Ex parte Mankichi*, 13 Haw. 570; or in a case with which he has had no previous connection, although a question of law is involved which was involved in certain other cases at the trial of which he had presided when a circuit judge: *Ex parte Ah Oi*, 13 Haw. 534. Under a statutory provision that in the event of the disqualification of a justice of the supreme court his place should be filled by a circuit judge "who has had no connection with the said cause" it was held that the "cause" was the exact case or issue brought to the court by the appeal and that a circuit judge would not be disqualified from sitting on the appeal even though he had passed upon issues in the general cause which were not involved in the appeal: *Estate of Banning, supra*. The provision now under consideration in the Organic Act was copied from the corresponding provision of the Con-

stitution of 1894, as is the case with many other provisions of the Organic Act.

In *Smith v. Wingard*, 3 Wash Ter. 260, under a provision in the Organic Act of the Territory that "no justice shall act as a member of the supreme court in any action or proceeding brought to such court by a writ of error, bill of exceptions, or appeal, from any decision, judgment or decree rendered by him as judge of the district court," it was held that a justice was not disqualified by reason of having made interlocutory orders or decisions in the court below, and that in order to disqualify him the order or decision below must have been the final one from which the appeal, bill of exceptions or writ or error was taken. In *Case v. Hoffman*, 100 Wis. 314, 352, where the provision was that "no judge of an appellate court . . . shall decide or take part in the decision of any cause or matter which shall have been determined by him, while sitting as a judge of any other court, unless there shall not be a quorum without him," the judge in question had in the court below sustained a general demurrer to the complaint, and it was held that he was disqualified on the appeal because one of the questions raised on the appeal was the same as one of those passed on by the judge below, the court being divided as to whether a certain other question also was substantially the same as one that had been passed on by the judge below. In *Phillips v. Germania Bank*, 107 N. Y. 630, under a provision that "no judge or justice shall sit at a general term of any court or in a court of appeals in review of a decision made by him or of any court of which he was at the time a sitting member," it was held that on an appeal from an order made by one judge setting aside an order made by another judge, the judge who made the latter order was not disqualified, because the appeal was not from his order but from the order of the other judge. In *Van Arsdale v. King*, 152 N. Y. 69, under the same provision, the judge was held disqualified because it appeared that he was sitting in review of an order made by himself. In *American Construction Company v. Jacksonville Railway*, 148 U. S. 372, under

a provision that "no justice or judge, before whom a cause or question may have been tried or heard" in the circuit court "shall sit on the trial or hearing of such cause or question in the circuit court of appeals," the question was whether a judge was prohibited from sitting on an appeal which was not from his own order but from an order setting aside his order, and the court, remarking that the question was a novel and important one, granted a rule to show cause why a writ of certiorari should not issue and left the question to be determined on further argument upon the return to the rule to show cause. In *Moran v. Dillingham*, 174 U. S. 153, the court used the following language with reference to this provision:

"The enactment, alike by its language and by its purpose, is not restricted to the case of a judge's sitting on a direct appeal from his own decree upon a whole cause, or upon a single question. A judge who has sat at the hearing below of a whole cause at any stage thereof is undoubtedly disqualified to sit in the circuit court of appeals at the hearing of the whole cause at the same or at any later stage. And, as 'a cause,' in its usual and natural meaning, includes all questions that have arisen or may arise in it, there is strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, in the court of first instance, is thenceforth disqualified to take part, in the circuit court of appeals, at the hearing and decision of the cause or of any question arising therein. But, however that may be, a judge who has once heard the cause upon its merits in the court of first instance is certainly disqualified from sitting in the circuit court of appeals on the hearing and decision of any question, in the same cause, which involves in any degree matter upon which he had occasion to pass in the lower court."

In that case the court, it is apparent, took a broad view of the scope of the provision but, although the provision was broader in some respects than the provision now in question, it said nothing that would indicate that under a provision like that now in question a judge would be disqualified under the circumstances of this case. The language of the provision would

require undue stretching to make sitting on an appeal or new trial cover sitting on a motion for a change of venue.

The temporary writ may be made absolute.

Ballou & Marx and *R. B. Anderson* for petitioners.

J. A. Magoon and *J. Lightfoot* for respondent.

IN RE LORRIN ANDREWS, ATTORNEY GENERAL.

APPEAL FROM THE AUDITOR OF THE TERRITORY.

SUBMITTED FEBRUARY 20, 1905. DECIDED MARCH 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

Duty of circuit court stenographer, subject to direction of court, to furnish to attorney general without charge copy of transcript of evidence in law action instituted for use of Territory.

OPINION OF THE JUSTICES BY WILDER, J.

In May, 1903, an action was instituted in the first circuit court by the Territory against Cotton Bros. in which the jury rendered a verdict in May, 1904, in favor of the plaintiff. Defendants thereafter filed a motion for a new trial and also a bill of exceptions. The attorney general, who appeared for the Territory in the action, ordered a copy of the transcript of the evidence therein from the official stenographer for the purposes of said motion and on the hearing of the bill of exceptions. The official stenographer delivered a copy of the transcript to the attorney general and presented with it a bill for the same amounting to \$43.74. This bill the attorney general approved and drew a voucher for that amount against the appropriation for incidentals in his department. The auditor refused to audit the bill and refused to draw a warrant

for the amount thereof. The attorney general now appeals from the decision of the auditor.

The stenographer was appointed under the authority of section 1692 of the Revised Laws, which provides that he "shall receive for his services such salary as the legislature may from time to time appropriate." A salary was appropriated by the legislature for the stenographer.

The sole question at issue is, did the attorney general have the right to draw on the appropriation for incidentals in his department in order to pay the stenographer in question for a copy of the transcript furnished.

The duties of a circuit court stenographer are not defined by statute, and are in law such duties as are reasonably appropriate to the office of a court stenographer. Such duties would include the furnishing of transcripts of the evidence or copies in proper cases subject to the directions of the judge or court before whom such evidence was taken. In our opinion it is a reasonable duty of, and within the scope of the services to be performed by, the stenographer to furnish free of charge a carbon copy of the transcript of evidence to the attorney general on direction of the judge or court in a proper case. The procedure should be for the attorney general to request the trial court to order the stenographer to furnish him with a copy of the transcript desired. In a proper case, such as the one referred to in this matter, the duty of the trial court would be to direct the stenographer as requested. If it was not a case where the attorney general was entitled to a copy of the transcript free of charge, then he could draw on his incidental appropriation to pay for the same if the transcript was desired for official purposes. But that is not this case.

It has not been shown that the attorney general requested the trial court to direct the stenographer as above set forth, and for that reason the appeal should be dismissed. But, inasmuch as such request of the trial court, if it had been made, would without doubt have been granted, it is clear that the stenographer is not entitled to be paid in excess of his salary

for this copy of the transcript, and for this reason also the appeal should be dismissed.

The auditor was right in refusing to issue the warrant asked for.

The appeal is dismissed.

The attorney general, *L. Andrews*, for appellant.

Smith & Lewis for auditor.

T. M. HARRISON v. J. A. MAGOON, F. B. McSTOCKER,
L. C. ABLES, DOROTHEA EMERSON, T. E. COW-
ART, J. H. KIRKPATRICK, A. E. POWTER, J.
WOLFENDEN AND G. D. MOORE.

PETITION FOR REHEARING.

ARGUED FEBRUARY 20, 1905.

DECIDED MARCH 6, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DeBOLT IN
PLACE OF WILDER, J.

REHEARING—*denied, the petition therefor being based on misapprehen-
sion of former decision.*

A rehearing is denied where the court based its former decision on the ground that the contract sued on was incomplete, and not, as contended, on the ground that it was not several as well as joint, or that, if it was only joint, a recovery could not be had against such of the parties thereto as had undertaken without due authority to bind all.

AMENDMENT—*by appellate court, no error being found in judgment below.*

Although the statute permits amendments to be made after judgment and on appeal, and amendments should be allowed more freely when, as in this case, a new action would be barred by the statute of limitations, this court should not allow the plaintiff an

amendment which would be ineffective without a new trial and then arbitrarily reverse the judgment below and grant a new trial in order to make the amendment effective, when no error is found in the judgment below.

OPINION OF THE COURT BY FREAR, C.J.

This is a petition for a rehearing of the case reported ante, p. 332. It is based upon two grounds. The first is that at the original hearing the plaintiff, who is the petitioner, relied upon the ruling made in this case in 13 Haw. 360, that the contract sued on was joint and several, and argued that if the contract was joint and not joint and several, and some of those purporting to join in the contract were not liable, a recovery could be had against such of them as had undertaken without due authority to bind all jointly, whereas the court, as it is contended, reconsidered the former ruling and held that the contract was joint, and not joint and several, and overlooked the argument that even though it was joint a recovery could be had against some of the parties thereto if not against all. This ground is based upon a misapprehension of the view that the court took in its recent decision and which is set forth, clearly as it seems to us, on pages 338 and 339, ante. That decision was based on the ground that the contract sued upon was incomplete, whether it was joint and several or only joint in form. Among other things the court said, on page 339: "An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement." It was also pointed out in that decision that the court, as it was constituted when the ruling was made that the contract was joint and several, considered it still an open question whether the contract was complete or not. With reference to this the court in its recent decision (page 338), referring to the earlier decision, used this language:

"In denying the plaintiff's motion for a rehearing of the decision sustaining the demurrer the court said: 'Whether or

not, if it shall appear hereafter that some of the persons named as defendants neither executed nor subsequently ratified the execution of the agreement, the others can still be held jointly liable, . . . are questions which have not yet arisen and upon which no opinion is expressed.' 14 Ib. 532. The court evidently had in mind the question whether the agreement would be complete unless all signed or ratified."

The second ground relied upon for a rehearing is that, even if the first ground should not be sustained, a rehearing should be had for the purpose of allowing the plaintiff to amend his complaint and then have a new trial. The amendment proposed is one by which the case would be changed from an action against all the present defendants upon the special contract, or for a breach of that contract, based on the failure of the company to give the plaintiff, upon his dissatisfaction with the condition of the partnership business in Tasmania, stock of the value of £2,000 in some other district of the company's field of operation, in exchange for his interest in the company represented by £2,000 recited to have been paid in by him, to an action against the defendant Ables alone for the value of about 6,000 head of sheep and an interest in certain land, which in fact, instead of the £2,000 recited, was turned over by the plaintiff to the said Ables as the plaintiff's contribution to the partnership.

It is urged that this amendment may be allowed now by this court under the broad provision of the statute relating to amendments (Revised Laws, Sec. 1738) and under the view expressed in *Dowsett v. Jones*, 9 Haw. 543, and the cases there cited, to the effect that an amendment should be more freely allowed when, as in the present case, a new action would be barred by the statute of limitations.

We regret that we cannot take this view. It is true that the statute is broad and that it expressly permits amendments of certain kinds after as well as before judgment, but this does not mean that in addition to allowing an amendment the court may, at it would have to do in this case in order to make the amendment effective, reverse the judgment of nonsuit below

and order a new trial when no error is found in the judgment below. If that judgment had been reversed and a new trial ordered, the court might also grant leave to amend before the new trial should be had. Likewise if the amendment were merely to conform the complaint to the proof, or otherwise was designed to support the judgment below, it might be allowed here, and of course, in such case, it would be effective without reversing the judgment below or ordering a new trial. The difficulty is that no error has been found in the judgment below, and in the absence of error that judgment cannot be reversed merely for the purpose of allowing an amendment and making it effective. This is the view generally taken elsewhere. For instance, in *Sutter v. San Francisco*, 26 Cal. 112, in which a similar proposition was made, the court said:

"The appeal is from the judgment, and we find no error to vitiate it. We hold that the court committed no error, so far as the record shows its action, and that the judgment is in all respects legal. We cannot, therefore, reverse it, for we find no error to justify such action, and plaintiff cannot now amend, because there is a valid final judgment; and there is nothing more to be done, without first reversing this judgment. It would be an anomaly in legal proceedings to hold the judgment in all respects correct, and then arbitrarily reverse it."

To the same effect, see *People v. Jackson*, 24 Cal. 630; *Gibbons v. Scott*, 15 Cal. 285; *Colorado Springs Co. v. Hopkins*, 5 Colo. 338; *Denison v. Tyson*, 17 Vt. 549.

Most of the cases cited contra by the plaintiff are not in point. The case of *Balcom v. Woodruff*, 7 Barb. 13, however, is somewhat in point, for in that case the statute was almost identical with ours and the statute of limitations would have barred a new action, although other circumstances in the case were somewhat different from those in this case. The court there allowed an amendment *nunc pro tunc*, and then, without finding error in the judgment of nonsuit below, set aside that judgment and ordered a new trial in order to make the amendment of avail to the plaintiff. In support of this course the court cited an

earlier case in the same jurisdiction (*Holmes v. Seely*, 17 Wend. 75), but said:

"This relief, however, is granted under the peculiar circumstances of this case, and the case is not to be made a precedent. The general rule is that a party who has not applied for an amendment until he has been nonsuited, is too late to ask for a new trial, in addition to an amendment."

In that case, it may be added, the plaintiff had moved in the lower court for leave to amend and for a new trial, as well as to set aside the judgment of nonsuit.

A rehearing is denied.

The plaintiff in person; *Robertson & Wilder* also for the plaintiff.

J. A. Magoon; J. Lightfoot; Kinney, McClanahan & Cooper, and *S. H. Derby* for defendants.

H. HACKFELD & COMPANY, LIMITED, v. W. C. ACHI,
KAPIOLANI ESTATE, LIMITED, W. R. CASTLE
AND J. M. MONSARRAT.

APPEAL FROM CIRCUIT JUDGE. FIRST CIRCUIT.

SUBMITTED FEBRUARY 23, 1905. DECIDED MARCH 6, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF WILDER, J.

MORTGAGE FORECLOSURE—collateral security—suit for foreclosure by assignee of note and mortgage assigned by way of collateral security.

A mortgage by A. to M. to secure A.'s promissory notes was assigned with the notes to the plaintiff and its assigns "by way of collateral security" for payment of M.'s note to the plaintiff. The deed of assignment provided that the plaintiff was "to have full authority to assign, transfer or sell said security at public or private sale either in their own name or as my attorney" and con-

tained an appointment of the plaintiff as the assignor's attorney "to proceed in my name by suit or otherwise for the purpose of enforcing the payment of the said promissory notes of the said W. C. Achi either by sale of the mortgaged premises under the terms of the said mortgage securing the said notes as aforesaid or otherwise in the same manner that I could have done in case the above note given by me to the said H. Hackfeld & Company, Ltd., is not paid at maturity." Held: Under the assignment the plaintiff in its own name could foreclose the mortgage in default of payment of the indebtedness so secured.

BOND TO STAY ORDER OF SALE PENDING APPEAL.

The defendants having appealed from an order of sale, the court ordered the sale to take place despite the appeals unless the defendants on or before a date named filed a bond in the sum of \$2,000 conditioned for payment of interest on the principal debt until decision on the appeals. Held: The bond was authorized by statute.

DEMURRER FILED TOO LATE.

Defendant A. did not appear within the time limited in the summons except to object to an order appointing a receiver. About three months after the time limited, and at the time set for hearing, he filed a general demurrer which on plaintiff's motion was struck from the files, although no order was made that the bill as against him be taken as confessed. He afterwards appeared and contested the bill in various ways and offered no defense other than the demurrer. Held: The demurrer was properly struck from the files.

FEDERAL STAMP ACT.

Promissory notes dated July 1, 1899, were not subject to the U. S. stamp act, which was not then in force in the Hawaiian Islands.

SALE IN TWO PARCELS INSTEAD OF A WHOLE OR IN PARCELS AS DESCRIBED IN MORTGAGE.

It appearing by affidavit of an attorney of the plaintiff familiar with the property that it could best be sold in two parcels which were far removed from each other, rather than as a whole or in the numerous parcels described in the mortgage, held: The sale was properly ordered to be made in two parcels.

SALE OF LIVE STOCK AND OTHER PERSONAL PROPERTY WITH EACH PARCEL TOGETHER WITH ALL THE STOCK, ETC., AND OTHER GOODS AND CHATTELS THEREUPON.

Held: The sale of the live stock and other personal property

in connection with each parcel without suggestion of the approximate number of the animals or whether they were in one or the other of the two widely separated tracts of land was not advantageous, therefore the decree confirming the sale will be set aside unless within one week from the decision the plaintiff remit from its deficiency judgment against the defendants the sum of \$6,470 for the value of the animals shown by the receiver's subsequently filed report to have been on the premises.

Id.—evidence.

Evidence of the defendant Achi as to the value of the property sold and the number of animals on the premises was struck off as being uncertain and speculative. Held: The evidence was too uncertain and conjectural to authorize the inference that the sale was improperly made.

OPINION OF THE COURT BY HARTWELL, J.

This was a bill to foreclose a mortgage made July 1, 1899, by the defendant Achi to the defendant Monsarrat to secure the mortgagor's four notes aggregating \$40,000 and interest, payable respectively to Monsarrat's order in six months, one year, two and three years from their date. At the same time Monsarratt gave the plaintiff his promissory note for \$42,101.86 payable to the plaintiff's order "within three years after date" with interest at eight per cent. and executed and delivered to the plaintiff an instrument reciting his above mentioned note and declaring that in consideration of his indebtedness to the plaintiff upon his said note he did thereby "sell, assign, transfer and convey to the said H. Hackfeld & Company, Ltd., and their assigns by way of collateral security" the said promissory notes of Achi (copying them), together with the said mortgage. The instrument goes on to provide as follows:

"The said H. Hackfeld & Co., Limited, to have full authority to assign, transfer or sell said security at public or private sale, either in their own name or as my attorney; such assignment, transfer or sale to be without prejudice to me as payee and mortgagee under the said promissory notes and mortgage securing the same, and all amounts received by the said H. Hackfeld & Co., Limited, from any such assignment, transfer or

sale to be placed to my account in satisfaction of my said indebtedness to the said H. Hackfeld & Co., Limited, and any balance over and above such indebtedness to be paid to me or my personal representatives."

The instrument contains an appointment of H. Hackfeld & Company as Monsarrat's attorney with power of substitution "to proceed in my name, by suit or otherwise, for the purpose of enforcing the payment of the said promissory notes of the said W. C. Achi either by sale of the mortgaged premises under the terms of the said mortgage securing the said notes as aforesaid, or otherwise in the same manner that I could have done, in case the above note given by me to the said H. Hackfeld & Co., Limited, is not paid at maturity; and after deducting the amount of my said indebtedness to the said H. Hackfeld & Co., Limited, and all costs and expenses connected with the collection of said notes hereby assigned, or with the sale of the said mortgaged premises, to pay over the balance remaining, if any, to me or my personal representatives. But upon payment of the above promissory note by me to the said H. Hackfeld & Co., Limited, or its assigns then the said H. Hackfeld & Co., Limited, or its assigns shall re-transfer the said collateral security to me or my legal representatives."

It appears by the record that the plaintiff filed its petition for foreclosure April 5, 1904. Service of process returnable in ten days after service was made April 5 on the defendant Achi and on April 6 on the defendants Castle, Monsarrat and the Kapiolani Estate. Monsarrat's answer was filed April 14, admitting the allegations in the bill of complaint and consenting to the granting of the relief prayed for. Time for answering was extended for the other defendants until April 27 and April 27 was extended for fifteen days thereafter. May 16 the Kapiolani Estate filed a demurrer to the bill, which was overruled by consent August 22, with leave to answer over. July 21, on the plaintiff's motion supported by affidavit of H. A. Isenberg, a receiver was appointed to take charge of and preserve the live stock covered by the mortgage pending the de-

termination of the cause, the receiver being given authority to prevent interference with the live stock by the defendant Achi. July 22 Achi moved to set aside the order appointing the receiver on the ground that it was made in his absence, because of mistake and excusable neglect, and also that there were no facts sufficient to authorize the appointment. Achi's affidavit is in substance that he thinks the ranch is increasing in value, that he denies the charges of improper conduct set forth in Isenberg's affidavit and avers that "while it is true that he has admitted that he has no legal defense, inasmuch as the interest is unpaid and the principal overdue in part, yet he believes that if plaintiff would give him further time he could fully pay and discharge the said mortgage." Castle's affidavit is that he understood that the motion was to be heard at 9:30 a. m. on Friday, July 22, and that Derby, one of the plaintiff's attorneys, had so informed him. This is met by Derby's affidavit denying that he told Castle that the motion would be heard at 9:30 and alleging that he "distinctly informed said W. R. Castle that the aforesaid motion would be heard at 9 a. m." September 2 plaintiff filed a motion that the case be set down for hearing at an early date. September 9 Castle filed an answer admitting portions of the bill, denying information as to other portions, leaving the plaintiff to prove the rest and averring his ownership of that portion of the mortgaged land known as Kaohe 4 "containing an area of 1135 acres more or less" by deed from Achi of April 17, 1900, released from the mortgage May 10, 1900, and claiming that the premises so conveyed and released were not subject to the mortgage and should be excepted from the foreclosure; also that he is "owner of all the other premises described in said mortgage," admitting that they "are subject to the lien of said mortgage," and averring that he is the "owner of all the cattle, horses, pigs and other chattels on the said premises whether subject to the lien of said mortgage or not." September 12 the Kapiolani Estate filed its answer, admitting the execution of the mortgage and its assign-

ment to the plaintiff for the purposes set forth in the deed of assignment, claiming that the purpose of the assignment was solely to secure Monsarrat's note, denying that the Achi notes had not been paid, claiming the mortgaged property except Kaohe 4 under a mortgage from Achi of February 24, 1903, to secure payment of \$6,163.32 on Achi's note for that sum payable to this defendant and due and owing; further claiming for itself the dower right released by Achi's wife under this mortgage and not released in the former mortgage and that a foreclosure decree ought to confirm the dower right and its value to this defendant, submitting that no decree for foreclosure could be made because the bill does not aver that Monsarrat had failed to pay his note or that the plaintiff is entitled to payment of Achi's notes. Upon the filing of this answer the plaintiff by leave of court amended its petition by averring demand upon Monsarrat for payment of his note and that he failed to pay the same, and that the same with interest is still unpaid and owing to the plaintiff. On September 2 plaintiff moved for rehearing, giving all the defendants notice that the motion would be presented September 6 at 10 o'clock a. m. We see no record of the hearing of this motion, but the transcript shows a hearing September 10, at which Monsarrat was present in person, Castle and Achi were represented by Mr. Withington and the Kapiolani Estate and Achi by Mr. Ashford. A general demurrer of Achi was that day filed by Mr. Ashford, being Achi's first appearance otherwise than in his motion to set aside the order appointing the receiver. It was claimed for Achi that he was at liberty to plead until a default had been entered, but on the plaintiff's motion his demurrer was struck from the files because not filed within the time limited by law. The hearing was resumed September 12 when the court, in answer to objections that the plaintiff was not entitled to a foreclosure, said that it was "satisfied upon investigation that the holder of a promissory note and mortgage given for payment of the same, assigned to him as collateral

security, would entitle him to maintain this action." The plaintiff's evidence was that the property mortgaged had been sold by Monsarrat to Achi for \$10,000 cash, balance of \$40,000 secured by the mortgage, which was therefore within the statute excluding dower. The defendants objected to the introduction of the deed and mortgage, mortgage notes and assignment on the ground that they were not stamped according to the Federal law, which as claimed was in effect at the date of the instruments, the act relied upon being "An act to provide ways and means to meet war expenses and for other purposes," which went into effect June 14, 1898. The evidence showed that one note for \$5,000 had been paid by Achi on account of the mortgage and that \$38,429.79 were due and owing on the other notes, and that Monsarrat, although requested, had made no payment upon his note other than the said payment of \$5,000 which was credited to him, and that the balance of his note remained owing and unpaid. The defense placed in evidence the deed from Achi to Castle of Kaohe 4, the plaintiff's release of the same, Achi's deed to Castle of January 21, 1904, of the equity in the property covered by the mortgage to Monsarrat, and the mortgage of Achi to the Kapiolani Estate of February 24, 1903. The court made a decree of foreclosure and sale September 19, excepting the land Kaohe 4 released to Castle, to raise the amount of \$38,429.79 due to the plaintiff with costs of suit and of sale, the property to be sold by Commissioner Simonton in two parcels described in the order of sale. The first parcel included twenty-four pieces of land partly in fee and partly in leasehold, "together with all the stock, cattle, horses, donkeys, pigs, etc., and the brand and branding irons, buildings, agricultural tools and implements, dairy fixings, implements and paraphernalia, furniture, and all other goods and chattels upon and used in the enjoyment of the aforesaid premises, as covered by the mortgage of the defendant W. C. Achi, said stock, etc., being described in the aforesaid mortgage as follows: 'Together with the stock now upon all the afore-granted premises and heretofore sold and conveyed

by the said J. M. Monsarrat to said W. C. Achi, as hereinafter stated, which stock is branded Y and consists approximately of four hundred head of cattle as nearly as can be ascertained; approximately forty head of horses as nearly as can be ascertained; donkeys, pigs, etc.; and in addition thereto, all the increase thereof and any and all stock to be hereafter put upon said premises during the existence of this mortgage; and the brand and branding irons, buildings, agricultural tools and implements, dairy fixings, implements and paraphernalia, furniture, and all other goods and chattels upon and used in the enjoyment of the afore-granted premises.' "

The second parcel mentioned in the order of sale describes four different pieces of land, "together with all the stock, cattle," etc., in the same language above mentioned at the end of the first parcel. The order required the commissioner to sell at public auction at the front door of the Judiciary Building, in Honolulu, at noon on Saturday, October 22, 1904, after giving public notice for at least three weeks prior to the sale in the "Hawaiian Star" newspaper, as well as "in some paper upon the island of Hawaii suitable for the publication of such notices," and authorized the plaintiff, as well as the defendants, to become purchasers. September 28 the plaintiff moved that the sale take place October 22 as ordered "despite the appeals of the defendants," unless on or before October 10 they filed a bond in the sum of \$7,000 or in such sum as the court deemed proper, conditioned for payment of the interest due the plaintiff in case the sale did not bring sufficient to pay the interest as well as the amount of the mortgage, basing the motion upon the affidavit of Pfotenhauer, a director of the plaintiff corporation, that the property was not worth the amount due and that the plaintiff would suffer great loss if the sale were put off until the appeal of the defendants was determined; also that the defendant Achi was unable to respond to any deficiency judgment. The court, after hearing the parties, granted the motion and ordered that the sale take place despite the appeals on November 12, 1904, at 12 o'clock noon unless

the defendants on or before October 10 filed a bond in the sum of \$2,000 "with good and sufficient surety conditioned for the payment of interest on the principal debt of the defendant W. C. Achi to the plaintiff until the decision on said appeals by the supreme court." November 18 the commissioner filed his return and account of sale with petition for confirmation of the sale, showing that he had conformed to the requirements of the order in publishing notices, and also had sent copies of the advertisement of the sale "to many prominent people and possible purchasers in the Territory, calling attention to the many advantages of the property to be offered for sale and the unusual chances for investment," and that through Morgan, a licensed auctioneer, he had caused the property to be sold at public auction November 12, 1904, at noon; that Franz Buchholtz became the purchaser of the first parcel for \$9,500 and of the second parcel for \$4,250; that immediately prior to the crying of the sale by the auctioneer the attorneys of the defendant Castle gave formal notice of objection to the sale on the ground that "the personal property is not described, nor is there any method by which it can be definitely ascertained what personal property is being sold, nor is it exposed or produced at the sale; and further, that included in the description is personal property of said W. R. Castle which has been mingled and mixed with the personal property, if any, which is subject to the mortgage, by the receiver in said action, and that the said receiver has not made any report from which it can be determined what said property is. Not waiving other objections heretofore made." The report showed the net proceeds of sale, exclusive of commissioner's fee, \$11,756.50, leaving a deficiency of \$27,014.42.

The receiver's report, dated November 26 and filed December 5, mentions that he had been informed only November 24 by mail of the auction sale on the 12th inst.; that in order to take care of and get together and count the cattle he had to build a fence about 6,000 feet long, securing a paddock of about 400 acres in which the cattle that were kept could stay for a few

weeks up to the sale; that he then engaged men to drive the cattle into the paddock and that the bulk of them and the horses had been secured; he kept only two men to go daily to hunt for stray cattle and take care of those which were caught, to drive horses and mules and look after pigs and donkeys. All this he says was done in Honomalino. He says that all the live stock was taken from Kolo to Papa except a few pigs; that he left the pigs and donkeys running where they were because there was no fence to put them into and no food for the pigs if they were caught. He says the cattle were in good condition, also the pigs and donkeys, but that the horses were rather poor because they had had to work very hard and had not had sufficient water and food; that he got in about 200 cattle, of which two or three died, thirty horses and mules, including a few colts, of which two of the older animals died in the dry weather; that there are said to be about sixty pigs and thirty donkeys running wild on a big tract of land overgrown with shrubs and cactus; that the drive would have been expensive and the receiver considered it the most economical to leave them alone and only take care that none should be stolen.

At the hearing upon the plaintiff's motion to confirm the sale the defendants filed objections which in substance were: 1. That the sale ought not to have been ordered pending appeals. 2. That the number and quality of the cattle and other live stock were unknown at the time of the sale and inaccessible to prospective purchasers. 3. That the division of the real estate into two parcels was arbitrary and unwarranted. 4. That the receiver became the purchaser of the property for prices far below its value and grossly inadequate. The defendant's evidence failed to show that inquiries were made at the sale with reference to the number of cattle and where they were. Monsarrat's evidence of the value of the property several years ago was stricken out by consent. His evidence concerning the number of cattle upon the premises was that there were 400 cattle at the last drive when he owned the ranch several years ago. He described the way most of the land lay, in

two long, narrow strips widely separated from each other, furnishing a map which was filed. Achi testified concerning his estimate of the value of the property and of the number of cattle upon it, which on the plaintiff's motion was struck out on the ground that it was speculative and uncertain. His evidence of other sales at a distance of some thirty-five miles was also on the plaintiff's objection ruled out. The court thereupon made an order confirming the sale, directing a conveyance to the purchaser and making a decree that the plaintiff have and recover of Achi the unpaid balance of \$25,609.07, from which order and decree the defendants appealed. The defendants contend that the decree should be reversed because: 1. The demurrer of the defendant Achi was struck from the files. 2. The plaintiff had no right to maintain the suit. 3. Achi's notes ought not to have been received in evidence because not stamped. 4. The premises were sold in two parcels instead of as a whole, or in several parcels as described in the mortgage. 5. The order of sale of the stock and other personal property in connection with each parcel, and its description of the property was too indefinite and the property was not identified or exhibited at the time of the sale, and the sale was ordered before a report from the receiver to show what the personal property was which was to be sold, the number of each kind of animals, their condition, etc.

1. We think that the defendant Achi's demurrer was properly struck from the files, since it was filed long after the time within which the summons required him to appear. It has for many years been the practice in this jurisdiction to insert in the summons issued in equity cases a limit of time for the defendant to appear and answer, being "ten days after service, if the defendant resides on the island of Oahu, and twenty days after service if made on either of the other islands." This practice is defined in Paragraph C of Rule 21 of the Rules of the Circuit Courts promulgated May 27, 1893. There can be no doubt of the power of the court to limit the time in which a defendant may appear. The effect of the non appearance of

a defendant within the time limited would entitle the plaintiff to an order taking the bill as confessed. Such an order would be a matter of course. *Oakley v. O'Neill*, 2 N. J. Eq. 287. It is not essential, however, to further proceedings on the bill that there be a formal entry that it is taken pro confesso. *Linder v. Lewis*, 1 Fed. 378. After a bill is taken as confessed there are certain defenses, among others the defense of an adequate remedy at law, which cannot be made by the defendant. *Electric Co. v. Reedy*, 66 Fed. 163. The demurrer was not filed until three months after the time when the case was returnable. The defendant subsequently appeared and contested the bill in various ways and has offered no defense other than the general demurrer that the bill did not state facts sufficient to constitute a cause of action.

2. Monsarrat's assignment to the plaintiff of the Achi notes and mortgage as security for payment of Monsarrat's note authorized the plaintiff in its own name to foreclose the mortgage in default of payment of the indebtedness so secured. The power expressed in the assignment to proceed in the assignor's name to enforce payment of the Achi notes under the terms of the mortgage did not limit the plaintiff to bring a foreclosure suit in the name of the assignor. The only case cited by the defense as opposed to this view is *Bank v. Hayes*, 112 Cal. 75, in which it was held that the delivery of a note and mortgage without endorsement or written transfer would not deprive the mortgagee of his right to sue on them in his own name with consent of the transferee. "At most," said the court, "it was only a pledge and as between the pledgor and the pledgee the legal title should remain in the former." In this case the legal title in the mortgage and note was assigned to the plaintiff.

3. At the date of the notes the United States stamp act was not in force in the Hawaiian Islands. In the case cited by the defendant (*Makainai v. Hoy*, 14 Haw. 607), the notes were dated January 10, 1901, when the Organic Act had taken effect.

4. We see no error in requiring the premises to be sold in two parcels. The affidavit of Cooper, one of the plaintiff's attor-

neys, was before the court, setting forth that he was familiar with the property and believed it thus could be sold to the best advantage because the lands in the two parcels were far removed from each other; that the land was used principally for ranching and was to a great extent unfenced, and that it was then impossible to tell exactly what unbranded cattle, of which there were a great number, were covered by the mortgage and what cattle belonged to third parties; that he believed it would be impracticable to sell the cattle apart from the lands and a great expense to get the cattle together, and that they would bring more if sold with the land than if sold separately.

5. It was evident, however, that the live stock was not sold to advantage with no suggestion of the approximate number of the animals or whether they were in one or the other of the two widely separated tracts of land. The receiver who had been appointed to look up and care for the stock could before the sale have furnished the information shown by his report of November 26. The plaintiff might have caused this information to be obtained or the defendants might have called for it. The case gives the impression that before the sale was ordered neither side cared about the matter; that both parties thought that, owing to the alleged inability of the mortgager to meet a deficiency judgment, a few thousand dollars more or less in the result would make no difference. The bond required as a condition of suspending the order of sale pending the appeals was authorized by statute. The evidence ruled out was too uncertain and conjectural to authorize an inference that the sale was improperly made; but by reason of the failure to specify in the order or advertisement of sale the approximate number of animals to be sold and on which of the two parcels of land they were to be found the decree appealed from will be reversed and the cause remanded, unless within one week from date of this decision the plaintiff shall remit from the deficiency judgment the sum of \$7,500. The value of the animals shown by the receiver's report, namely, 200 cattle at \$20 a head, thirty horses (and mules) at \$30, sixty pigs at \$10 and thirty don-

keys at \$2.50 (at the prices per head claimed by the defendants), would be \$5,575. We allow the additional sum of \$1,925, which is more than 33 1-3 per cent., to make up the above amount of \$7,500 for stock on the lands not found by the receiver.

Upon the filing of such remittitur within the time mentioned the decree appealed from will stand.

Kinney, McClannahan & Cooper and *S. H. Derby* for plaintiff.

Castle & Withington for W. C. Achi and W. R. Castle.

C. W. Ashford for Kapiolani Estate.

J. M. Monsarrat pro se.

FRANK GODFREY, TRUSTEE FOR THOMAS METCALF, *v.* HELEN ROWLAND, HING CHUNG, J. F. FRANCIS, KONDO, D. O. HAMMOND, JOSE DO ESPIRITO SANTO, W. O. SMITH, TRUSTEE, AND B. J. GALLAGHER.

MOTION FOR REHEARING.

ARGUED FEBRUARY 23, 1905.

DECIDED MARCH 6, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF WILDER, J.

REHEARING.

The court having held that the statutory requirement of a marriage license was directory merely, and that a license was not required for a valid marriage, and also that a conveyance made in 1875 by a life tenant to remaindermen did not affect an intermediate contingent remainder, held: The statutes (sections 1284, 1288 and 1289, C. C., the latter section making children illegiti-

mate when their parents were not legally married), had not been overlooked by the court and the arguments of the defendant Rowland on the above matters, as well as upon certain instructions ruled upon by the court, had not been overlooked or misconceived, and that a rehearing is denied.

STATEMENT OF THE MOTION.

The court having held (*ante*, p. 377) that instructions numbered 7, 8 and 9, given at the defendants' request, were erroneous and that therefore the verdict should be set aside as to defendant Rowland and a new trial ordered, and having further expressed its opinion that instructions numbered 13, 14 and 16, given at the defendants' request, were erroneous, and having overruled the defendants' contention that a conveyance made in 1875 by Metcalf, life tenant under a will to Julia Prosser, Helen Rowland and W. G. Rowland, trustee for the remaindermen, "operated to destroy the contingent estate of any children of Frank Metcalf and that defendant Helen Rowland must have judgment in any event," the defendant Rowland now "moves for a rehearing upon the ground that certain questions decisive of the case and duly submitted by counsel were overlooked by the court and upon the ground that certain parts of said decision are in conflict with express statutes of the Territory of Hawaii. Said grounds are more particularly the following:

"1. That the court overlooked the point duly made by defendant that defendant's instruction No. 7 was correct as applied to the above cause because of sections 1284, 1288 and 1289 of the Civil Code making children illegitimate when their parents were not legally married within the contemplation of article 53 of said Civil Code and that the ruling that said instruction was erroneous was in conflict with said statutes.

"2. That the ruling that said instruction No. 7 was erroneous even as to that part relating to the finding of a license overlooked the argument above mentioned and was in conflict with the aforesaid statutes.

"3. That in deciding that defendant's instructions Nos. 8 and 9 were erroneous the court overlooked the aforesaid argu-

ments and also the provisions of section 767 of the Civil Code as well as the arguments in regard to said instructions on pages 10 and 11 of defendant's brief.

"4. That in deciding that defendant's instructions Nos. 13, 14 and 16 were erroneous as allowing a consideration of probabilities and proof of the adultery of the mother, the court overlooked defendant's argument on pages 13-15 of defendant's brief to the effect that the circumstances mentioned in said instructions could be considered in deciding whether there was a showing of non access, although taken alone each circumstance might have little or no weight.

"5. That in deciding that the adultery of the mother could not be shown the court overlooked the fact that there was evidence tending to show that the alleged husband and wife were not living together at the time of such adultery which point was duly made by defendant.

"6. That in deciding that the trial judge erred in excluding the marriage license offered by plaintiff in rebuttal the court overlooked the argument of defendant that the proof of a marriage was part of plaintiff's main case and that the admission of the rebuttal evidence offered was a matter in the sound discretion of the trial judge.

"7. That in deciding that defendant's instructions as to marriage and legitimacy were vague and misleading the court overlooked the argument repeatedly made by the defendant that those instructions or at least some of them stated correct law and that their vagueness, if any, could have and should have been cured by counter instructions from the plaintiff and that it was not defendant's duty to so cure them.

"8. That in deciding on the effect of the deed offered by defendants and marked Defendants' Exhibit 1 the court overlooked and wholly misconceived defendant's argument in regard thereto, i. e. the court decided that a deed of bargain and sale passed no greater title than the grantor had to convey and could not bar contingent remainders; whereas defendant's argument admitted that said deed, as far as Frank Metcalf was concerned, only passed his life estate, but argued that the effect of said deed was to unite said life estate with the next vested estates in the property, either as a whole or *pro tanto*, and that by reason of such merger the intervening contingent remainders, which were not estates, were squeezed out either as a whole or in part.

"Defendant submits that while this petition may not affect the ordering of a new trial, even if sustained, nevertheless each issue decided has become a part of the law of the case and can only be reversed now if at all."

OPINION OF THE COURT BY HARTWELL, J.

The court held that the statutory provisions concerning marriage referred to in the defendant's motion were mandatory, except that relating to a license, which it held to be directory. This necessarily meant, and it was after due deliberation intended to mean, that persons could be "legally married in contemplation of this article" (sections 1875, C. L., 1289, C. C.) who had not a marriage license. Distinction is made between those things which the statute declares shall be *necessary* "in order to make valid the marriage contract," and the provision that "it shall in no case be lawful for any person to marry without a license," between a legal or valid marriage and one which is not in conformity with directory requirements of the statute.

As to the conveyance by the life tenant the court held that it "operated upon his life estate only and did not affect the contingent remainder in any child which he might lawfully have begotten." Whether the deed would not at common law result in a merger of the life estate with the vested remainder is immaterial, since at the date of the deed the common law was not in force in Hawaii, and the opinion of the court that the deed did not affect the intermediate contingent remainder would not be modified by any reconsideration of the common law upon the subject.

The defendant's arguments upon the other matters referred to in her motion, although not sustained, were in no manner overlooked or misconceived, nor did the court overlook the fact alleged in the fifth ground of the motion.

The motion is denied.

A. G. M. Robertson and Thompson & Clemons for plaintiff.

Kinney, McClanahan & Cooper and S. H. Derby for defendant Rowland.

CHAS. S. DESKY *v.* C. W. BOOTH AND W. E. FISHER.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED FEBRUARY 24, 1905. DECIDED MARCH 6, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

MORTGAGE—reformation.

Decree of circuit judge dismissing bill to reform mortgage affirmed.

MORTGAGE—foreclosure sale—in lots or as a whole.

Discretion of circuit judge to order a foreclosure sale of the mortgaged lands in lots, instead of as a whole, not interfered with. *Cooper v. Island Realty Co.*, 16 Haw. 92, followed.

OPINION OF THE COURT BY WILDER, J.

This is an appeal by C. S. Desky from a decree of one of the judges of the first circuit court, dismissing a bill to reform a mortgage, and for an injunction to prevent a statutory foreclosure sale of the mortgaged property as a whole.

The first contention of the appellant is that the mortgage in question should be reformed so as to exclude therefrom certain items of property included therein, as he alleges, by mutual mistake. The mortgage was executed in 1900, and the bill to reform the same was brought in 1904. This contention is utterly untenable. Aside from the fact that the suit to reform the mortgage was not instituted for more than two years after the discovery by Mr. Desky of at least one of the alleged mistakes, the evidence clearly shows that there was no such mistake as would justify the reforming of this instrument.

The next contention of the appellant is that the mortgaged premises should be sold in lots and not as a whole. This con-

tention must also be overruled. The authorities referred to by appellant on this point are either not applicable to the facts herein or are disposed of by the case of *Cooper v. Island Realty Co.*, 16 Haw. 92, 105, which was not referred to by counsel for either side, holding that it was discretionary to decree a sale of mortgaged land in lots or as a whole. It is a well settled principle that the discretion of a trial judge will not be interfered with except in a clear case of abuse. In this case, after an examination of the record, exhibits and testimony, including the evidence which was offered but rejected, we are of the opinion that the trial judge was correct in refusing to order a sale by lots instead of as a whole.

The decree appealed from is affirmed.

John W. Cathcart and *J. G. Pratt* for plaintiff-appellant.

J. Alfred Magoon and *J. Lightfoot* for defendants-appellees.

TERRITORY OF HAWAII v. PACIFIC CLUB.

QUESTION RESERVED BY CIRCUIT COURT.

ARGUED MARCH 1, 1905.

DECIDED MARCH 6, 1905.

HARTWELL, J., CIRCUIT JUDGES DE BOLT AND ROBINSON IN
PLACE OF FREAR, C.J., AND WILDER, J.

SPIRITUOUS LIQUORS—*furnished by an incorporated social club not licensed to sell to its members and guests constitutes selling and violates statute imposing penalty for selling without license.*

The Pacific Club, a Hawaiian corporation, by its own admissions furnished spirituous liquors to its members and guests who paid the club therefor, this being done not for profit or as a business, but solely for mutual convenience. Held: The transaction was a selling and subjects the club to the penalty provided by

section 444 of the Penal Laws for selling spirituous liquors without a license as provided by statute.

Id.—*Organic Act, section 55.*

In view of the provision of the Organic Act, section 55, "Nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the territorial legislature shall provide," a failure on the part of the legislature, if any there be, to provide for licenses for such clubs would not be a defense for selling without license as provided by law.

OPINION OF THE COURT BY HARTWELL, J.

The district magistrate of Honolulu found the defendant, a Hawaiian corporation, upon its own admission guilty of selling spirituous liquors in violation of section 444 of the Penal Laws of 1897 and imposed a fine of \$100 and \$3 costs, from which judgment the defendant appealed to the circuit court of the first circuit, waiving a jury. The case coming before the first judge of that circuit, he reserved for the consideration of this court the question of law whether or not upon the admitted facts the defendant was guilty of the charge. It is unnecessary to recite in detail the facts admitted. They show the usual methods of social clubs by which for the convenience of its members and guests the club supplies drinks for members and invited guests on their orders. We have no doubt that the facts show that the defendant has violated the law. The absence of intention to violate it or the belief of members of the club that the club is not violating the law does not do away with the statute or affect the nature of the acts complained of. The transactions between the club and its members and guests which are shown by the admitted facts amount in law to sales of spirituous liquors by the club to its members and guests. The motive or purpose of the selling is immaterial, and so is the fact that sales are not made for profit or as a matter of business. The transactions constitute sales, whether the statutes concerning licenses are adapted or intended for such clubs as this or not, and whether or not the written constitution of the club or the law permits it to take out a license to sell. If for any reason

the club cannot or does not obtain a license, it is amenable to the law against selling without a license, and to avoid this result its members would have to do as house-holders do, namely, buy their own wines and liquors of licensed dealers and entertain their guests free of charge. This seems to us to be so clear that we cannot accept any other interpretation of the law, whether made by officials who may also be members of this club, or expressed in the views of eminent courts elsewhere. We have examined all of the decisions cited by the defendant in its able brief, but in so far as they are made under statutes like our own we cannot and do not regard them as law. There is no room for construction of the statute. The meaning of its language is too clear for doubt. Apparently Federal authorities are not in doubt upon the subject since, as shown by the admissions, they require a license of the club for retailing wines and spirituous liquors. The object of the statute imposing a penalty for selling without license is not merely to restrict and regulate sales, but to obtain revenue therefrom. No one would say that a corporation selling as the defendant has done but solely for purposes of profit, would not be liable, and yet the good or bad faith of the selling is immaterial. The case is not presented of two or more persons buying liquors for themselves to be paid for by those of their number who use them, but of a corporation buying and paying for liquors and then selling them.

The final argument of the defendant appears to be as follows: The statute imposes a penalty upon persons selling without having such a license as is provided by law. The law provides no license for sales of the kind admitted to have been made in the present case; therefore the defendant is not liable, even on the supposition that it is selling.

This contention cannot be admitted to be correct in view of the provision of the Organic Act, section 55: "Nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the territorial legislature shall provide." If the territorial legislature has failed to provide regu-

lations and restrictions for club sales of spirituous liquors the conclusion is that such sales are prohibited by the Organic Act.

The cause is remanded to the circuit court with instructions that the admitted facts show that the defendant was guilty of the charge of selling spirituous liquors without a license.

L. Andrews, Attorney General, for the Territory.

W. A. Whiting, W. L. Stanley and R. W. Breckons, for defendant.

DISSENTING OPINION OF CIRCUIT JUDGE DE BOLT.

I am unable to concur in the opinion of the court in this case. As I view the transaction in question, the furnishing of intoxicating liquor by the club to one of its members is not a sale within the contemplation of the statute, but a mere distribution of such liquor.

The Pacific Club is not an ordinary business or stock corporation, but a voluntary association organized and maintained as a *bona fide* institution, not as a business concern for profit or a livelihood or as a scheme to evade the law, but chiefly for the literary, intellectual and social advantages thereby afforded to its members and guests. The furnishing of liquor by the club to its members and guests is merely incidental to its chief purposes. It does not sell or furnish liquor to the public in general or to outsiders, and its membership is selected and limited, and no person can become a member at his pleasure. The club is not engaged in the business or traffic of selling intoxicating liquors for profit or a livelihood, nor is it open to the public. Its liquors are kept for consumption and not for sale. "Business," in a legislative sense, is that which occupies the time, attention and labor of men for purposes of profit or a livelihood. Such are not the purposes of this club. While it is true that a profit is not an essential ingredient to a sale, still, doubtless it will be conceded that an indispensable criterion of business is that profit is intended. And I submit that the various legislatures, from time to time, in the enactment of our

statutes, relative to intoxicating liquors, had these essential elements of the business and traffic therein, in mind; and did not intend or contemplate that an organization, such as the Pacific Club, should be required to pay a license merely for the purpose of equitably distributing liquor among its members for their own use. I say "equitably distributing," because such, to my mind, is the obvious purpose and intent of clubs of this character, as contradistinguished from a sale. Such a transaction or distribution is not a bargain or a sale in the way of trade, and therefore not within the purview or meaning of the statute. Viewed from a technical and strict legal standpoint all the elements of a sale may appear to be present in the transaction; still, it does not necessarily follow that there was a sale. We must look to the good faith, intention and purpose of the parties, as well as to all the surrounding facts and circumstances. Black On Intoxicating Liquor at Sec. 142, says that, "the rational conclusion is that the intent must govern." In 11 Am. & Eng. Enc. Law, p. 727, it is said that "the distribution of liquors by a *bona fide* club among its members is not a sale within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it, and the law prohibiting the sale of liquor on Sunday does not apply to such a club." Does not this clearly show in truth and in fact that the members, whether of an incorporated or unincorporated club, are only drinking their own liquor? It would seem, however, that guests of the club do not stand in the same relation towards the club as its members. Guests have no title or claim whatsoever to the liquor and when it is furnished to them for money that probably would be a sale. *Klein v. Livingston Club*, 34 L. R. A. 94.

In the case at bar the liquor is purchased by the club for the use of its members, and to be distributed among them as they may desire, each paying or placing in a general fund according to the quantity consumed by each individual member. This, as it seems to me, whatever else it technically may be, is not a sale in fact, but a convenient and equitable method of dis-

tributing among the members their own liquor. The learning and plausible reasoning of the courts upon the question as to the title in the first instance, being in the club and passing to the members upon the payment by him for the liquor, as it seems to me, is artificial, strained, misleading and a sacrifice of substance for mere form.

Furthermore, the statute, with which we are now dealing, is penal, and should be construed strictly against the defendant and liberally in its favor. An additional element to be considered in this connection, is that of the government officials whose duty it has been for a long period of time to construe and enforce this statute. They have never, prior to the present action, sought to continue or enforce it against clubs of the character in question. Upon this phase of the case, *People v. Adelphi Club*, 31 L. R. A. 510, is in point.

It is my opinion therefore that the Pacific Club has not violated the statute.

IN THE MATTER OF THE ESTATE OF JAMES CAMP-
BELL, DECEASED.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED FEBRUARY 24, 1905. DECIDED MARCH 8, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CIRCUIT JUDGE.

Jurisdiction of circuit judge at chambers in probate to construe will not decided.

EXECUTORS—*accounts—commissions.*

Various matters of accounting and commissions of executors on certain transactions determined.

OPINION OF THE COURT BY WILDER, J.

James Campbell died in Honolulu on April 21, 1900, leaving a will which was admitted to probate before a circuit judge of the first circuit court sitting at chambers. Abigail K. Campbell, his widow, now Mrs. Samuel Parker, and J. O. Carter and Cecil Brown qualified as executrix and executors, respectively, under said will. On August 25, 1902, the executrix and executors filed their final accounts and petitioned for an order of distribution of the estate of the deceased to themselves as residuary devisees and legatees in trust. These accounts, after reference to a master, were passed upon by the second circuit judge sitting in probate on June 12, 1903. On January 4, 1904, the executrix and executors filed a further account, in which they conformed to this decision and showed certain additional payments. On May 14, 1904, the executrix and executors filed a supplemental account, which was referred to a master, who filed a report thereon. The executrix and executors excepted to certain findings of the master. After a hearing on these exceptions the second judge filed on July 25, 1904, a decision on final accounts and entered an order in conformity with the various decisions. The executrix and executors duly appealed from that order, except as to items 1, 2, 13 and 14 thereof.

The appellants contend, in the first place, that item 3 of the order was outside the functions and beyond the power of the circuit judge, sitting in probate, to make; which item was as follows:

“That the following payments made by the executrix and executors be charged to the principal of the personalty of the estate:

\$357,741.91	Bequest of one-third of the personalty to Mrs. Parker.
67,156.11	Expenses proper.
40,950.00	Family allowance.
38,824.88	Homestead repairs.
32,293.40	Investments—Assessments on shares in corporations.”

The reasons that appellants give are that the order of distribution can be made without construing the will, and in order to pass on this item the will must be construed, which construction is a function of the court of equity and not of a court of probate; that the questions involved can only properly arise after the estate has been distributed, in this case the distributees being the executrix and executors to hold as trustees, and that the beneficiaries under the trusts created by the will would not be bound by such a construction in the present proceedings. To this, the contention, on behalf of Princess Kawanakoa, the appellee, is that the trial judge, sitting in probate, must necessarily have the power to construe the will wherever and to the extent necessary for the discharge of his duty in settling these accounts. Without deciding that this contention of the appellee is correct, still, so far as it appears from the record, the accounts can be settled, a decree of distribution entered, and the executrix and executors discharged, without the necessity of construing the will at this time. After the executrix and executors have accounted for all of the property of the decedent and have properly performed their duties, and consequently are entitled to be discharged, of what use is it to determine in advance questions that might or might not arise after the distributees, as trustees, have taken over the balance of the property? It is clear that the will need not be construed in order to determine to whom the executrix and executors should turn over the balance of the property remaining in their hands. It is also clear that the accounts can be passed on and settled without construing the will at this time.

The appeal as to item 3 of the order will be sustained, except in so far as it has been consented to by the appellants with reference to "investments" and "expenses proper."

Item 4 of the order is: "That the account of the executrix and executors be surcharged with the sum of \$260, being the amount of the commissions charged by them on the sum of \$80,170.46 in excess of the statutory commissions." This amount was surcharged because commissions at the rate of 10,

7 and 5 per cent. were charged in the accounts filed in January, 1904, and the trial judge held that commissions at those rates could not be again charged until the expiration of another year from that time. Inasmuch as there will have to be another account filed by the executrix and executors, when the question as to whether or not commissions at those rates may be charged will more properly arise, the appeal is sustained as to this item.

Item 5 of the order is: "That the account of the executrix and executors be surcharged with the sum of \$5430, being the commissions charged by them on (a) the sum of \$96,100 the proceeds of sale to M. P. Robinson of 500 shares of the capital stock of the First American Bank and 250 shares of the capital stock of the First American Savings and Trust Company; (b) the investment of \$96,100 in the note of M. P. Robinson secured by said shares; and (c) the receipt of \$96,100 being the proceeds on payment of said note; in excess of statutory commissions." The facts in connection with this transaction were as follows: When the testator died he owned 500 shares of the First American Bank stock (afterwards the First National Bank of Hawaii) and 250 shares of the First American Savings and Trust Company upon which \$50,000 had been paid. On August 13, 1900, the amount necessary to make the stock fully paid up, namely, \$25,000, was paid. On January 5, 1903, the whole of this stock was sold to M. P. Robinson for \$96,100, for which he gave his note, which was paid on September 15, 1903. Commissions amounting to \$7,207.50 were charged in connection with this transaction.

Counsel for the appellants contend that they should only be surcharged with \$1875, while Mr. Brown, one of the executors, contends that they should not be surcharged anything. The executrix and executors are entitled to charge on this transaction $2\frac{1}{2}$ per cent. on \$71,100 (being \$96,100 less \$25,000 paid to meet calls on the stock), which amounts to \$1777.50. They were not entitled to again charge commissions of $2\frac{1}{2}$ per cent. on the same amount. It is claimed that it was a final payment to

themselves as distributees, but from the record we cannot so find. It was paid to them as executrix and not as distributees. Consequently the appeal on this item is disallowed.

Item 6 of the order is: "That the account of the executrix and executors be surcharged with the sum of \$525, being the commissions charged by them on the sum of \$21,000 claimed by them to be principal collected from Liliuokalani." The facts of this transaction were substantially as follows: Testator in his life time had loaned to Liliuokalani various sums of money at different rates of interest on security of two mortgages on different pieces of real property, one of which mortgages, by agreement between testator and Liliuokalani, was not recorded. She afterwards had an additional charge made to the mortgage that was not recorded. Certain sums were paid by Liliuokalani on account, both during Mr. Campbell's life time and after his death. When the existing indebtedness was reduced to \$21,000, she made an application for a further loan of \$14,000. The executrix and executors cancelled the two existing mortgages and loaned her \$35,000 on the security of a new mortgage with interest at 7 per cent., the interest on one of the old mortgages being at 7 per cent. and on the other at 6 per cent. The executrix and executors charged a commission of 2 1-2 per cent. on the \$21,000 as principal moneys collected.

The trial judge held that the commissions charged were improper on the ground that the transaction was merely the making of an additional loan. With this view we cannot agree. The executrix and executors, so far as the record shows, used their best judgment in actually calling in the old mortgages and making a new loan. We cannot say, in the absence of evidence, that they called in the old mortgages and made a new loan simply in order to charge a larger commission. So far as the record appears, the executrix and executors used good judgment in handling this transaction. The appeal on this item is sustained.

Item 7 of the order is: "That the account of the execu-

trix and executors be surcharged with the sum of \$625, being the commissions charged by them on the sum of \$25,000 claimed by them to have been principal of the estate collected from H. Hackfeld & Company." The facts of this transaction were substantially as follows: H. Hackfeld & Company were owing the testator in his life time about \$300,000, evidenced by their promissory note, which was payable by installments of \$25,000 per annum. The note was not secured other than by endorsements of members of the firm of H. Hackfeld & Company. An installment of \$25,000 became due and was paid in June, 1903. Mr. Brown, on behalf of the executors, invested this \$25,000 in Pioneer bonds, but instead of taking the cash from Hackfeld & Company and going to the Bank of Hawaii, where the bonds were deposited, and receiving the bonds in exchange for the cash, for the sake of convenience and saving interest he had Hackfeld & Company deliver the \$25,000 worth of bonds to him direct, and he endorsed the payment of \$25,000 on the note.

The trial judge held that this was an exchange of securities. We cannot agree with the trial judge in this matter. It seems to us that the transaction, so far as the statute on commissions is concerned, was the same as if Mr. Brown had received from Hackfeld & Company the \$25,000 in cash and had then gone to the Bank of Hawaii and paid the \$25,000 in cash for the twenty-five \$1000 bonds of the Pioneer Mill Company. Merely because some one else did this for the executor does not change the real nature of the transaction. The appeal on this item is sustained.

Item 8 of the order is: "That the account of the executrix and executors be surcharged with the sum of \$1000, being the commissions charged by them on the sum of \$40,000 claimed by them to have been principal of the estate collected from Lucy Peabody." The facts were as follows: Lucy Peabody was indebted to the testator in the sum of \$40,000 secured by mortgage on real estate. She was over a year in arrears in interest, and it was decided by the executrix and

executors that they should press for collection of the debt. Then Mrs. Parker said she would take it off the hands of the estate and wait for the interest. Mrs. Parker purchased the mortgage and took it over, paying for the same by a check on Claus Spreckels & Co., the proceeds from which check were invested by the executrix and executors in Young Hotel bonds.

The trial judge was of the opinion that the whole transaction was merely an exchange of securities and ordered the commission surcharged. It seems to us that counsel for the appellee fails to distinguish between what he terms the result of the transaction and the transaction itself. The result of the transaction certainly was that the estate got the Young Hotel bonds and Mrs. Parker got the Peabody mortgage, but that result could certainly have been reached by either a technical exchange of securities or by a sale of the Peabody mortgage and an investment of the proceeds therefrom. In our opinion this was practically the same as cash collected and reinvested. The appeal on this item is sustained.

Items 9, 10 and 11 were as follows: "That the account of the executrix and executors be surcharged with the sum of \$625, being the commissions charged by them on the sum of \$25,000 claimed by them to have been principal invested in Pioneer Mill Company bonds or paid to themselves on account of final payment."

"That the account of the executrix and executors be surcharged with the sum of \$1100, being the commissions charged by them on the sums of \$14,000 and \$30,000 claimed by them to have been principal invested on (a) \$14,000 on mortgage by Liliuokalani and (b) \$30,000 on mortgage by L. B. Kerr, or paid to themselves on account of final payment."

"That the account of the executrix and executors be surcharged with the sum of \$1000, being the commissions charged by them on the sum of \$40,000 claimed by them to have been principal invested in Young Hotel bonds, or paid to themselves on account of final payment."

Commissions were charged in each instance on the ground that these transactions constituted final payments by the executrix and executors to themselves as residuary distributees in

trust. With this contention we cannot agree. The trustees have not even yet qualified. Executors cannot declare that to be a final payment, upon which commissions are charged, which is in fact not a final payment. One of the purposes of the present proceeding is to get an order of distribution and make a final payment. This is not a case where commissions are allowed to be charged on a simple paying out, but it must be a final payment. The appeals on these items are disallowed.

Item 12 of the order is as follows: "That the account of the executrix and executors be surcharged with the sum of \$84.25, being expenses incurred by them in connection with the San Jose property." These charges appear to have been incurred in connection with property belonging to the estate and should be allowed. The appeal on this item is sustained.

Item 15 of the order is as follows: "That upon a readjustment of the account showing payment of the items properly chargeable to principal out of the principal instead of the income, in accordance with opinion filed June 12, 1903, the executrix and executors will be allowed 2 1-2 per cent. on \$71,000 as final payment of cash principal." The appeal on this item is sustained for the reasons hereinbefore set forth and also because new accounts from the executrix and executors from the date of the last ones filed should be called for.

The order appealed from is set aside and the cause remanded to a judge of the first circuit court for such further proceedings as may be proper not inconsistent with this opinion.

Holmes & Stanley for executrix and executors, appellants.

Cecil Brown in person.

J. J. Dunne for Princess Kawananakoa, appellee.

OAHU RAILWAY AND LAND COMPANY *v.* WAIALUA
AGRICULTURAL COMPANY, LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 27, 1905.

DECIDED MARCH 10, 1905.

HARTWELL, J., AND CIRCUIT JUDGES DE BOLT AND PARSONS IN
PLACE OF FREAR, C.J., AND WILDER, J.

SET OFF—recoupment—pleading.

A written agreement contained several distinct matters of agreement, among others an agreement to buy coal for a term of years at a price named; also an agreement for leasing land for a rental to be arranged as stated. Held: The two transactions are so disconnected in their nature that a claim for rent of the land cannot be recouped in an action for the price of coal; nor can a claim for the reasonable value of the use of the land be set off, since it is unliquidated.

ID.—leases—agreement—construction.

An agreement that defendant "will from time to time lease to" plaintiff certain lands when not required for immediate uses of defendant, "such leasing to be upon the following terms and conditions: The rental shall be arranged with" plaintiff "upon the basis of a minimum fair percentage of the total rental paid by" defendant "for such lands as a whole—a corresponding reduction in rent to be made when any portion is so occupied by" defendant does not contemplate execution of leases, the words "lease" and "leasing" being used to mean letting. Held: The rental agreement means that the percentage shall be not according to acreage but values of land held by the parties, and was intended to put the rent on the basis of the lowest reasonable estimate of the values of the respective acres of land in its unimproved condition.

OPINION OF THE COURT BY HARTWELL, J.

The action was brought to recover \$4,800 and interest, balance of the agreed price of coal sold by the plaintiff to the defendant under an agreement of October 12, 1898, in which the defendant agreed to buy coal of the plaintiff for a term of years for a specified price. The answer admits the sale and purchase but denies that any balance is owing and sets up "by way of set off or counter claim" a claim for rent of portions of the upper lands of Kawaihoa, which under the same agreement the plaintiff had used, showing a balance of \$11,856.08 in favor of the defendant, for which it asks judgment. In the answer as finally amended there are four counts. The first, second and fourth are based on the agreement claiming that it meant that the rent should be proportioned to the number of acres used by the plaintiff as compared with the acreage of all of the upper lands of Kawaihoa, and sets forth the number of acres used by the plaintiff, which varied from year to year. The entire upper lands of Kawaihoa were hired by the plaintiff of the Bishop Estate for a fixed annual rental. The third count, claiming the same sum as the reasonable value of the land used by the plaintiff, appeared in a second amended answer. To the answer as first amended the defendant demurred on the ground that the claims were unliquidated and that none of them arose out of the same transaction and therefore could neither be set off nor recouped. The court overruled the demurrer, regarding the claim as recoupment, and also overruled the plaintiff's demurrer to the finally amended answer containing the third count for reasonable value of the use of the land, which demurrer was based on the grounds of the first demurrer, and also on the ground that the first, second and fourth counts showed no cause of action. Exceptions were allowed to the overruling of each demurrer.

If the defendant's rental claim can either be recouped or set off then the pleading was good and the demurrer ought not to have been sustained.

We cannot, however, sustain the plea as recoupment, because the two transactions are entirely distinct and separate from each other, although provided for in the same instrument. The defendant's agreement to buy coal at stated prices could not be a consideration for its agreement to let land to the plaintiff. It was the defendant which agreed to buy the coal, and not the plaintiff which agreed to sell. The defendant presents no claim for breach of an agreement by the plaintiff to sell coal. Neither of the agreements for buying coal or letting land in any way depends upon the other. "Where a contract, though entire in its form, relates to several distinct and independent acts to be done at different times, it is divisible in its nature, and an action of assumpsit will lie on each default." 1 Story on Cont., Sec. 25 d. Recouping is allowed only in matters arising out of and connected with the transaction upon which the plaintiff's action is brought. For instance, a defendant in an action for the price of goods furnished may recoup damages for breach of warranty or for fraud or negligence "growing out of and relating to the transaction in question." *Dushane v. Benedict*, 120 U. S. 637. So in an action for the agreed price of making anything for the defendant, the latter may recoup loss caused to him by use of defective material or from defective workmanship. But, as stated in *Erickson v. Volcano Co.*, 13 Haw. 430, "the very idea of a set off is that it is a debt growing out of a separate transaction from that sued on."

The case then resolves itself into considering whether the rent can be set off either under the first, second and fourth counts, which can be done if the agreement is construed as prescribing a definite sum for rental or can be set off under the third count for the value. We construe the agreement- however, as requiring the plaintiff to pay for the use of the land not the definite sum ascertainable by taking the ratio between the respective acreages used by the parties, but by considering the values of the land so used. This would rest upon a verdict of the jury upon evidence of value, and is not liquidated until ascertained by verdict. Our construction of the agree-

ment eliminates the defendant's claim in its third count for the reasonable value of the use of the land.

The agreement provides that the defendant "will *from time to time* lease to the party of the second part" (being the plaintiff) "for grazing purposes all of the upper lands of Kawaihoa when not required for the immediate uses of the party of the first part" (defendant) "such leasing to be upon the following terms and conditions: The rental *shall be arranged* with the party of the second part" (plaintiff) "upon the *basis* of a minimum fair percentage of the total rental paid by the party of the first part" (defendant) "for such lands as a whole; * * * a corresponding reduction in rent to be made when any portion is so occupied by the party of the first part" (defendant). The agreement further provides for constant changes in the land occupied according as the defendant should require land for its plantation or for supplying small farmer tenantry upon the lands, and also that the plaintiff might "withdraw from such agreements of lease at any time and surrender any portion of such pasturage lands when it may so desire and a corresponding reduction of rental shall thereupon be made, such leases to be for the term of the leases held by the party of the first part" (defendant) "unless terminated as aforesaid." The agreement also requires the plaintiff to use the land under certain prescribed conditions and to the extent and with and subject to the restrictions therein named.

It does not appear to us to be clear that the agreement contemplated the execution by the parties from time to time of new leases for the varying parcels of land which the plaintiff should use. It would be a very cumbrous and inconvenient way of doing things in order to accomplish the clearly intended object, which is that the defendant would let the plaintiff use the lands named in the agreement under the conditions and to the extent therein specified; nor perhaps can the agreement be regarded as a lease. Apparently the words "lease" and "leasing" are used in a not uncommon way to mean letting. An agreed rental for such use of land does not necessarily

imply a formal lease with a definite term and a description of the premises demised; but it is more difficult to show what the parties meant by rental "arranged upon the basis of a minimum fair percentage of the total rental paid by the lessor for such lands as a whole, with a corresponding reduction of rent when any portion of the land should be re-taken by the lessor." The plaintiff claims that if the agreement is to be taken as a lease these words are of such uncertain meaning that the lease is void. If, however, the agreement concerning the compensation to be paid for the letting is not so expressed as to be ascertainable it does not follow that the party using the land would not be required to pay what its use was worth. On the contrary, this obligation is implied by the law.

The plaintiff insists that if the words in question have any intelligible meaning, which it denies, it is that the rent is to be apportioned according to the value rather than to the area of the land, while the defendant calls for an apportionment by area. The latter method takes the ratio between the area of that part of the land of Kawaihoa used by the plaintiff and the entire area of the land in order to ascertain how much of the rent paid by the plaintiff to its lessor should be paid by the plaintiff to the defendant. In the plaintiff's view the percentage of the rent payable by it would be the ratio between the value of the land used by it and the value of the entire land of Kawaihoa, which it may be inferred would be a considerably lower rental than upon the defendant's method of computation. This is readily seen by considering that for instance, if the plaintiff occupied half of the land, which was worth only one-fourth as much as all of the land, the rent would be one-fourth of the entire rent instead of one-half, as it would be on the basis of acreage. A *fair* proportion of the rent would naturally refer to the fairly estimated values of the land, and in that meaning a *minimum* fair proportion would be the lowest proportionate value which is fair. On the other hand, it is difficult to assign any meaning to either of the words "fair" or "minimum" if the proportion is based on acreage,

since as shown by the defendant's pleadings that could be exactly stated. The parties, as we think, meant to fix the rent payable by the plaintiff to the defendant on the basis of the lowest reasonable estimate of the values of the respective areas of land, varying, of course, from time to time to correspond with the values of the lands used by the plaintiff; but we do not think that the parties contemplated the enhanced or improved value of the land held by the defendant, but only its value in its unimproved condition.

Our statute on the subject of set off is the following:

"It shall be competent to the defendant in any civil action to plead an off-set of like kind and denomination, existing in the same right, between him and the plaintiff, or having made a legal tender of money in full payment of the plaintiff's demand, to plead such tender, and bring the amount thereof into court in bar of further interest and costs, after such tender." Sec. 1752, R. L.

"If the demand set off is founded on a bond or other contract having a penalty, no more shall be set off than the sum equitably due." Sec. 1753, R. L.

"If there are several plaintiffs, the demand set off shall be due from them all jointly; if there are several defendants, the demand set off shall be due to them all jointly, except as is provided in the following section." Sec. 1754, R. L.

We think that the kind of demand which may be set off under the above statute does not include an unliquidated claim, but only a definite claim which can be fixed by computation. The claim allowed to be set off in the *Erickson* case (ante) was, it is true, based upon a quantum valebat; but the question before the court was simply whether the claim grew out of an independent transaction. The court did, however, hold in that case that unliquidated damages for the plaintiff's defective performance of the agreement sued on "could be allowed only by way of recoupment." None of the cases cited by the defendant appear to go to the length of holding that in the absence of express statutory authority an unliquidated claim, although based on an implied promise, can be set off. The de-

fendant's claim being for an unliquidated amount, cannot be set off as a debt under our statute.

Exceptions sustained. The order overruling the demurrer is vacated and the case remanded to the circuit court for further proceedings conforming herewith.

Ballou & Marx for plaintiff.

Castle & Withington for defendant.

TERRITORY OF HAWAII *v.* JAMES E. FULLERTON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 10, 1905.

DECIDED MARCH 14, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

On September 15, 1904, F. appealed to circuit court from decision of district magistrate convicting him of assault and battery. Nolle prosequi was entered in circuit court November 1, 1904. On October 28, 1904, F. was indicted for malicious injury, on which indictment there was a mistrial entered on November 15, 1904. Case again set for trial November 28, 1904, and then postponed until December 1, 1904. Motion by prosecution for continuance from December 1, 1904, to December 9, 1904, was denied. Nolle prosequi entered as to this indictment. On December 30, 1904, F. again indicted for malicious injury and for assault and battery. On motions to quash and pleas in bar to said indictments, held:

(1) After appeal from district magistrate effect of nolle prosequi in circuit court no bar to subsequent prosecution for same offense. *King v. Manner*, 3 Haw. 339, followed.

(2) Speedy trial not denied.

(3) Former jeopardy not shown.

OPINION OF THE COURT BY WILDER, J.

On September 15, 1904, in the district court of Honolulu, James E. Fullerton was tried, convicted and sentenced on a

charge of assault and battery. From this decision of the district magistrate he appealed to the circuit court. On November 1, 1904, a nolle prosequi was entered in the circuit court on this charge. On October 28, 1904, he was indicted for the offense of malicious injury, to which indictment, on November 2, 1904, he entered a plea of not guilty. On November 15, 1904, after a trial on said indictment, the jury failed to agree and a mistrial was entered. On November 17, 1904, Hon. Geo. D. Gear, second judge of the first circuit court, before whom the matter was then pending, assigned it to the Hon. W. J. Robinson, the third judge of said court. On November 19, 1904, the case was set to be tried on November 28, 1904, on which last day the court continued the trial until December 1, 1904, on the ground that the assistant attorney general, who had charge of the prosecution of the case for the Territory, was then actually engaged in the trial of a criminal case before the Hon. Geo. D. Gear, presiding judge at that term of court. On December 1, 1904, the assistant attorney general moved that the matter be continued until December 9, 1904, on the ground that he was the acting deputy attorney general at that term of court, and that for a week past he had been and was at that time actively engaged in the trial, before Judge Gear, of the case of *Territory v. Mahaulu*, and that said trial would not be finished on that day or possibly that week, these facts appearing by affidavit. This motion was denied, and the prosecution not being ready to proceed in the absence of Mr. Prosser, a nolle prosequi was entered by the court on motion of one of the attorney general's deputies. On December 30, 1904, the defendant was again indicted for malicious injury and also for assault and battery (apparently the same assault and battery for which he had been convicted in the district court) and gross cheat. On February 14, 1905, defendant filed a motion to quash the indictment for assault and battery on the ground that it was illegal for the reason that by the action of the attorney general in having a nolle prosequi entered on his appeal from the district magistrate on the con-

viction for assault and battery he had been denied his right of appeal and had not been given a speedy trial, and that he had been placed in jeopardy more than once for the same offense. On the same day he also filed a plea in bar to said indictment on the ground that if prosecuted thereon he would be placed twice in jeopardy for the same offense. On February 15, 1905, defendant moved that the indictment for malicious injury be quashed on the ground that it was illegal for the reason that, these offenses having arisen out of one transaction, he had been once tried for this offense, and by reason of the entering of the nolle prosequi upon the first indictment. On the same day he also filed a plea in bar to the said indictment on the same grounds. On February 18, 1905, the trial on each of these three indictments was transferred to the Hon. J. T. DeBolt, the first judge of the first circuit court. On February 20, 1905, to the indictments for assault and battery and for malicious injury defendant filed a motion for discharge from actual or constructive custody upon the grounds set forth in the motions and pleas, and upon the further ground that the punishment would be cruel and unusual if he should be convicted on the two indictments. On February 27, 1905, the first judge of the first circuit court overruled the motions to quash and pleas in bar and in effect disposed of the motion to discharge. The circuit judge certified to this court defendant's interlocutory bill of exceptions containing these rulings, presumably on the theory that he thought the same advisable for a more speedy termination of the case (Revised Laws, Sec. 1864), although the certificate, which is unsatisfactory in form, does not set out that fact.

The first question presented for consideration is the effect of the nolle prosequi in the circuit court after the appeal from the district magistrate. In prosecutions instituted in the first instance in the circuit court there is no question but that at any time prior to the impaneling of the jury a nolle prosequi may be entered by the court on motion of the attorney general. See *King v. Robertson*, 6 Haw. 718; 35 L. R. A. 701, note. So far

as the entering of the nolle prosequi was concerned, defendant was in the same position as if the prosecution had been begun in the circuit court in the first instance. This court has expressly held that after an appeal from a district magistrate a nolle prosequi is no bar to a subsequent trial. *King v. Manner*, 3 Haw. 339. See also *Commonwealth v. McCluskey*, 151 Mass. 488. We are clearly of the opinion that the effect of this nolle prosequi did not and does not bar a subsequent prosecution for the same offense.

As to the contention of the defendant that he has been denied a speedy trial, it is difficult to ascertain from the record what case defendant has been denied a speedy trial of. It could not be of the first indictment for malicious injury because that ended in a nolle prosequi. It could not be the trial on the appeal from the district magistrate because that also ended in a nolle prosequi. It could not be on the two indictments presented on December 30, because defendant has not even attempted to get a trial on either indictment. Therefore defendant has not been denied a speedy trial.

Defendant's contention that he has been placed twice in jeopardy is untenable, at least at this time. Only after a trial and a conviction or an acquittal on one of the indictments is had, can the question be raised as to whether defendant can be tried on another of the indictments.

There is no merit in any of the other contentions of the defendant.

While the attorney general had a right to nolle prosequi the first indictment and the grand jury had a right to indict defendant again for the same offense, this course may become vexatious and should not be followed except for good reasons. It may be, and we are inclined to think, that such a course, at least to the extent it was carried in this instance, should not have been taken, but the exceptions cannot be sustained for that reason.

The exceptions are overruled and the cases are remanded to the circuit court for further proceedings.

M. F. Prosser, assistant attorney general, for the Territory.

Geo. A. Davis, with whom *J. J. Dunne*, *F. E. Thompson* and *A. M. Brown* were on the brief, for defendant.

WILLIAM McCANDLESS *v.* LEE CHEW.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MARCH 13, 1905.

DECIDED MARCH 17, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

INJUNCTION—*waste—buildings not removable by tenant under covenant to deliver up.*

Defendant's lease contained a covenant against waste and that at the end of the term he would "peaceably deliver up said premises to said lessor or his heirs or assigns with all future erections or additions upon or to the same." Defendant had erected certain rough wooden buildings on the leased premises, one for a horse stable, another for lodging employes in the upper floor, and keeping hacks below; also two small sheds, one for washing hacks and wagons and the other for painting them, defendant being in the business of selling vegetables and keeping a hack-stand. Held: The buildings were within the intent of the covenant, but their removal causing no appreciable injury to the freehold, and the defendant not being shown to be unable to respond in damages, an injunction is properly refused. The damage from loss of the buildings is computable and is not waste which equity enjoins.

OPINION OF THE COURT BY HARTWELL, J.

We adopt the following statement of the case made by the trial judge in his decision:

"This is a bill to enjoin and restrain the defendant from tearing down and removing certain wooden structures or buildings, erected by the defendant upon certain premises owned by plaintiff and occupied by defendant as tenant of plaintiff.

"It appears from the evidence that on the 26th day of April, 1899, plaintiff, by written lease, signed by plaintiff and defendant, leased to said defendant certain premises, then owned by him and of which he is still the owner, situate at Palama, Oahu, more particularly described in plaintiff's bill, for the term of five years from the 1st day of January, 1900, for a rental of \$300 per annum, to be paid in equal quarterly payments in advance, the first of such payments to be made January 1, 1900, which lease is still in force.

"Among the covenants contained in said lease are the following, viz.: * * * 'That he, said lessee, * * * will not commit or suffer any waste of said premises; and also, at the end of said term will peaceably deliver up said premises to said lessor, or his heirs or assigns, with all future erections or additions upon or to the same.'

"Under and pursuant to said lease the defendant entered into possession of said premises and proceeded to erect and did erect thereon two wooden buildings or structures. On the 15th day of January, 1904, while occupying said premises as tenant of plaintiff, defendant proceeded to and did tear down and destroy a large portion of one of said buildings, and threatens to tear down and remove both of said buildings, unless restrained by the order of this court.

"It also appears from the evidence that the defendant was at all of the times mentioned and is now engaged in the business of raising vegetables on a portion of the demised premises and employed and used horses and wagons in hauling and conveying such vegetables to market, and that he was also engaged in maintaining, conducting and carrying on a hack-stand in the city of Honolulu, and owned horses and hacks or carriages to be used and which were used in and about the business of said hack-stand. That one of the buildings so erected by him upon the premises aforesaid consisted of a ridged or peaked roofed building, composed of rough lumber, fixed and resting upon posts set into the ground a distance of two and a half or more feet, and was partitioned or divided into stalls, for the accommodation of horses, in which the defendant kept his horses, both used in drawing his vegetable wagons as well

as those used in drawing his hacks or carriages. The other buildings consisted of a two-story ridged structure, composed of rough lumber, the upper portion being divided into about ten rooms and the lower portion constituting a single large room. The last mentioned structure covered a superficial area of about twenty-four feet by forty-eight feet, and rested upon timbers supported by coral stones, from fourteen to sixteen inches by from fourteen or eighteen inches in size. Owing to the fact that the ground upon which the building was erected sloped from mauka to makai, the ground immediately beneath the mauka end of the building was excavated to a depth of several inches and the coral stones upon which that end of the building rested were embedded into the soil a considerable distance, and the timbers resting upon the same and upon which the superstructure was erected were placed about six or seven inches below the surface of the soil immediately adjacent. The makai end of the building rested upon coral stones placed upon the surface of the ground, but which had become slightly depressed into the soil by the weight of the building. The lower portion of the main building, consisting of a single large room, was intended for use and was used by the defendant as a carriage repository or place in which to keep his hacks or carriages and vegetable wagons during the night time or whenever the same were not in use. With regard to the use of the upper portion, the defendant testified that the rooms therein contained were used by him for lodging the men employed by him, that he charged the men two dollars per month per room, but that he did not often collect the amount charged and that he himself lodged there for about two years.

"Attached to the main building are two sheds or lean-tos, consisting of rough lumber, the main building to which they were attached with spikes, constituting one side and the side furthest from the main building resting upon posts sunk into the ground a distance of two and a half feet or more. One of these sheds or lean-tos was used by the defendant as a wash-house for carriages and wagons and had an excavation under it varying from eighteen inches to two feet in depth, constituting a drain, for the purpose of carrying away the waste water due to washing the carriages and wagons. The other shed or lean-to was used by the defendant as a paint shop in painting his carriages and wagons. * * *

"The evidence in the case at bar fails to show whether or not

the buildings erected by the defendant could be severed from the realty without being destroyed, or reduced to a mere mass of crude materials, but I assume that the method adopted by the defendant,—the tearing down of the buildings, from the pursuit of which method he was restrained by the temporary injunction issued herein,—is the most feasible, if not the only means by which the removal of the buildings could be accomplished, and I assume, also, in view of the fact that a considerable excavation was made in the land immediately under the mauka end of the main building, and that holes were dug to receive the posts supporting the stable as well as the sheds or lean-tos attached to the main building, and also, in constructing the drain underneath the wash-house, that the removal of the buildings would result in some damage to the land itself.

“The plaintiff insists that the buildings erected by the defendant are permanent fixtures, but even if the court should find that said buildings were erected and constructed and used by the defendant for the uses and purposes of his trade or occupation, still he contends that the covenant contained in the lease on the part of the lessee to quit the premises upon determination of the lease ‘with all future erection or additions upon or to the same,’ is a controlling factor in determining the intent of the parties in reference to the removal character of the buildings, and that the relief prayed for in his bill should be granted because of such covenant.

“The defendant, on the other hand, claims the right to remove the buildings referred to, irrespective of the covenant contained in the lease, on the ground that the same are trade fixtures, being intended for use and used solely by him in his business of raising vegetables and in conducting a hack-stand, and therefore, removable by him at any time before the expiration of the lease.”

The judge held that the buildings were trade fixtures and as such removable by the tenant, notwithstanding the covenant, which he thought was not intended “to deprive the tenant of the right to remove trade fixtures,” regarding the case as within the rule in *Holbrook v. Chamberlain*, 116 Mass. 155. We have no doubt that in the absence of the covenant the buildings would be removable by the tenant within the term of his lease. The

following cases illustrate this doctrine: *West. N. C. Ry. Co. v. Deal*, 90 N. C. 112, a railway depot; *Russell v. Richards*, 10 Me. 431, a mill; *Van Ness v. Pacard*, 2 Pet. 137, a two-story building used for both residence and business of a dairyman. But we cannot say that the buildings were not "erections or additions upon or to the same," namely, upon the leased premises, for that is precisely what they were. In the *Holbrook* case, ante, a lessee had removed from a building on the leased premises certain shafting, pulleys and belts with a portable boiler and connecting steam pipes which the court held were either removable trade fixtures or personal chattels, and not within the intent of the covenant, which the court regarded as "limited to new buildings erected or old buildings added to the premises."

But because of the covenant to deliver up the buildings it does not follow that their removal constituted waste of the kind which equity will prevent. The extent of the damage to the freehold is capable of definite computation. The bill avers that the damage by the defendant's removal of a large portion of one of the buildings is "the sum of \$500" and that the value of the two buildings was "\$1,000 and upwards." It is evident that the only appreciable injury which the plaintiff would receive would be in the loss of the value of the buildings and not in any injury to the land which their removal would cause. The defendant is not shown to be unable to respond in damages in an action at law. In his answer he avers that he is responsible and solvent and claims that the "plaintiff has full and adequate remedy at law."

"An injunction is not granted to stay waste unless it appear that the injury would be irreparable, either because of the impossibility of estimating the damages at law, because of the insolvency of the defendant, or that a resort to law would result in interminable litigation." 1 *Spelling on Extr. Rel.*, Sec. 243. "It is not to be understood that injunction will be granted in all cases of waste, regardless of the fact that a proceeding at law may be instituted for the same cause. Where an

adequate remedy may be found, equitable relief will be refused here as in other cases." *Ib.*, Sec. 250.

"Where the injury complained of is susceptible of perfect pecuniary compensation, and one for which satisfaction in damages can be had at law, the injunction will be withheld." 1 High on Inj., Sec. 651.

In the following cases equity jurisdiction was declined on the ground that there was adequate legal remedy: *Nott v. Burgess*, 5 Haw. 420; *Haw. Com. & Sugar Co. v. Kahului R. R. Co.*, 11 *Ib.* 440; *Wundenberg v. Mossman*, 14 *Ib.* 167.

We sustain the decree appealed from, not on the ground that the defendant's covenant did not refer to the buildings, but on the ground that equity has no jurisdiction under the circumstances of this case. Decree accordingly.

J. A. Magoon, J. Lightfoot for plaintiff.

R. W. Breckons and H. Hogan for defendant.

JOHN FOWLER & CO. (LEEDS), LTD., v. R. CATTON
AND G. W. MACFARLANE.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 5, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., AND CIRCUIT JUDGES ROBINSON AND MATTHEW-
MAN IN PLACE OF HARTWELL AND HATCH, JJ.

ACCOUNTING—*denied on the evidence.*

An accounting sought by a principal as to storage charges and rates of commissions charged by an agent is denied,—the evidence, particularly statements of accounts and letters when in conflict with oral testimony adduced by the principal, showing that no more had been charged than was proper.

Id.—*when commissions paid to each of two alleged co-agents.*

One claiming to be sole agent charged commissions on orders secured by an alleged co-agent at the rate usually charged on orders sent through others than the agent. After he had ceased being agent, and had sent his statement of accounts to the principal showing these charges, the principal paid the alleged co-agent certain special commissions on these orders. Held, the principal was not entitled to recover from the agent the commissions so charged by him.

OPINION OF THE COURT BY FREAR, C.J.

This is a suit in equity for an accounting brought by a foreign corporation, having its principal office in London and its manufacturing works in Leeds, England, as principal, against the defendants as its agents in the Hawaiian Islands. The circumstances out of which it arose are similar to those out of which the case of *Macfarlane v. Catton*, decided this day, arose.

The defendant Macfarlane did not answer but more than two years after the suit was instituted filed a cross bill against his co-defendant, which cross bill was dismissed, rightly as we think, by the circuit judge on the same ground on which his direct bill against Catton was dismissed in the suit just referred to. No further attention need be paid to this. In neither suit do Fowler & Co. and Macfarlane seem to be antagonistic to each other.

The plaintiff practically seeks relief from the defendant Catton alone, and that particularly for the period beginning January 1, 1894, and ending February 28, 1899, during which Catton claimed to act as sole agent for the plaintiff in these islands. The plaintiff alleges that this defendant at the determination of the agency on the last mentioned date had in his possession a large quantity of unsold goods and withheld upwards of \$13,000 received from sales of goods and refused to account for the same. Catton sets up in his answer that he was sole agent during the period in question, that he had accounted for all moneys and property which came into his

hands as such agent and that the account had been closed. The evidence in the case of Macfarlane against Catton was made a part of this case and much further testimony and many exhibits were introduced but with the result that the circuit judge dismissed the plaintiff's bill as against the defendant Catton, holding that the evidence showed that the latter had fully accounted for all moneys and property that had come into his hands.

The plaintiff appealing now contends that the evidence shows that there are at least some matters in respect of which the defendant should be required to account. It seems to be practically conceded that Catton had accounted for all of the property that had come into his hands. At least, no effort was made to support the allegations in regard to the property or to contradict the evidence which showed that the property had been fully accounted for, and no question is now raised on this appeal as to the property. The only matters as to which it is contended that Catton should account are: (1) charges made for rent of warehouse or storage; (2) overcharges in the rates of commissions; and (3) commissions charged and withheld by Catton on orders obtained by Macfarlane during the period when Catton claimed to be sole agent.

Before considering these matters it may be well to set forth briefly the nature of the agency and the changes that took place in it from time to time. In 1880 the plaintiff, a manufacturer of steam plows and other machinery, appointed Macfarlane and one W. L. Green, then co-partners in Honolulu, its agents in these islands to take orders for and sell machinery, collect moneys due for machinery and remit the same to the principal after deducting commissions, etc. Originally the commission was 5 per cent. on orders taken by the agents, called direct orders, and on sales of machinery consigned to the agents for sale. A few years later a commission of 2 1-2 per cent. was allowed on orders, called indirect orders, sent by customers, particularly through houses in England and Germany, to the principal directly, that is, not through the

agents. Green and Macfarlane dissolved partnership in 1882 or 1883, but Green retained his interest in the agency until 1889. About 1883 Catton entered the employment of Macfarlane on a salary and 1 per cent. commission on the sales of machinery. About the same time Macfarlane, apparently because he was sharing commissions with both Green and Catton, arranged with the plaintiff to allow a further commission of 2 1-2 per cent. on sales of machinery consigned for sale. In 1889 Green retired from the agency and the plaintiff appointed Macfarlane and Catton its joint agents. About the same time the commissions were increased on direct and indirect orders respectively to 7 1-2 and 5 per cent. Macfarlane and Catton at first divided the commissions between themselves in the proportion of 3 to 2 and later 2 to 3 respectively. In 1893 Catton took the position that after the end of that year he would no longer act except as sole agent, and he acted on that theory from that time until the end of February, 1899, when he withdrew and Macfarlane was appointed sole agent. The reason for Catton's taking this position appears to have been Macfarlane's financial embarrassment, which began some time before 1889 and continued until some time after 1894, probably until the latter part of 1897, and in regard to which the plaintiff as well as Catton felt considerable uneasiness. There is, of course, dispute as to some of these matters. The appointment of the agents, the fixing of rates of commission and the changes in these from time to time do not seem to have been made in a formal way. They are shown by oral testimony as to conversations and understandings, the conduct of the parties, statements of accounts, allusions or claims in letters, etc., etc. There seems to have been more or less carelessness of statement or forgetfulness on the part of some of the witnesses. There is much conflict in the testimony and as a rule the letters are vague and unsatisfactory. There is even much inconsistency between letters written by the same person at different times, as if the writer had forgotten what had taken place or been written previously.

The matter of the charge for rent of warehouse or storage of goods consigned for sale is of comparatively minor importance. R. H. Fowler of the plaintiff company testified in substance that no arrangements were ever made for the allowance of rent; that rent had to be paid out of commissions; that the commissions were to cover all expenses of the agency; that Macfarlane had cared for the goods without charge; that if such a charge had been made it would not have been passed by the company; that he was not aware that any charges for storage had been made before the first "rent" charge, and that if any were made they were liquidated out of commissions. But he must have been mistaken, for both Macfarlane and Catton testify that prior to 1889 the plaintiff paid for the storage of consigned goods, and this seems to be corroborated by copies of the "accounts sales." Catton testifies further that an iron warehouse came out from Glasgow in 1889, which was set up and used for the storing of plaintiff's goods and the goods of Mirrlees, Watson & Co., for whom also the defendants were agents, and that he estimated that, considering the cost of the building, the ground rent and other charges, \$800 a year would be a proper charge for the whole building, or \$100 a quarter for the half used by the plaintiff, that charge taking the place of charges made previously for storage and certain other expenses, and that he explained this to Alfred Fowler when the latter was in Honolulu in 1890, and that he (Fowler) was perfectly satisfied. Apparently the warehouse belonged to Mirrlees, Watson & Co., and the rent was collected for their account. Several letters written in 1890 tend to confirm Catton's testimony on these points. The charge of \$100 a quarter was made in the accounts until 1895, when in March the plaintiff objected that it was too high and asked for a "modification," at the same time stating that it had never agreed to the charge. Two months later, in May, 1905, the plaintiff passed the account of April 1, 1905, containing an item of \$100 for rent of warehouse. Catton, in consequence of the plaintiff's objection to the charge of \$100, then re-

duced the charge to \$75 a quarter, and in March, 1898, the rent was further reduced to \$50, apparently in consequence of a letter from the plaintiff dated September 3, 1897, in which attention was called to the fact that \$100 had been charged to June, 1895, and \$75 thereafter. In that letter the plaintiff stated that it had never agreed to pay \$100 and that it expected an allowance of the difference between \$100 and \$75 for the period during which the higher rate had been charged, and that the plaintiff was willing to allow the charge of \$75 to stand but was not willing to continue paying that rate, and concluded, "anyhow we will not continue to pay so much as we have been doing and you must kindly do the needful to alter the present arrangement." Thus the plaintiff's contention as to storage charges prior to 1889 are wholly unsustained; the statement of Catton as to the arrangement made with Alfred Fowler in regard to \$100 a quarter is uncontradicted; the charges of \$100, \$75 and \$50 a quarter successively were passed by the plaintiff for years, and there is practically nothing but the statement of the plaintiff in the letters of 1895 and 1897 that it had never agreed to the charge of \$100, and no insistence was made then or at any subsequent time until the filing of this suit that a credit should be given for the difference between \$100 and \$75 for the period when the larger amount was charged.

In regard to the rates of commission, no effort has been made to show that the rate on stock sales was less than $7\frac{1}{2}$ per cent. As to the rate on direct orders, R. H. Fowler testified that it had never been increased beyond 5 per cent. and that no more than 5 per cent. had ever been agreed for such orders, but the evidence, including invoices prepared by the plaintiff itself, showing allowances of 7 1-2 per cent. commissions on such orders is so overwhelmingly against the testimony of Mr. Fowler that it is now conceded that he was mistaken upon this point. As to commissions on indirect orders, R. H. Fowler testified that the plaintiff arranged to allow 2 1-2 per cent. when possible and when the prices would permit it

and took the position that no more than that was ever allowable on such orders. Macfarlane testified that the rate was not uniform on such orders, but was 2 1-2 per cent. in some instances, 5 per cent. in others and 7 1-2 per cent. in others, according to the price obtained, although he finally admitted that the agents charged 5 per cent. and without objection on the part of the plaintiff until 1895, when they stated objections to Macfarlane in London, but that he (Macfarlane) did not advise Catton of these objections. Catton testifies that the rate on indirect orders was increased to 5 per cent. as well as that on direct orders to 7 1-2 per cent. upon Macfarlane's return from England in 1889, and that after discussing the matter with Alfred Fowler in 1900 the latter told him (Catton) to go on as he had been doing in the matter of commissions, which was, as the quarterly accounts showed, to charge 5 per cent. on indirect orders and 7 1-2 per cent. in other cases. Catton testifies also that the plaintiff endeavored to make the rate arbitrary on its part for each order but that he (Catton) would not stand it; also that there were but two exceptions, so far as he can remember, in the charges at these rates, both of which are explained by special circumstances, one being on a direct order and the other on an indirect order, for each of which the commission was 2 1-2 per cent. The other exceptions relied upon by the plaintiff, in which charges of 1, 2 and 2 1-2 per cent. respectively were made, were apparently cases of commissions charged for dividends collected for the plaintiff and not commissions on sales, or divisions of commission between the co-agents and not charges as between the principal and the agents. There seems to be no valid ground for distinction between the commissions on direct orders and those on indirect orders so far as their uniformity and recognition by both parties are concerned. Very likely the plaintiff might rightfully have fixed a special rate on any indirect order in advance as it did on one or two occasions, but, even if it could have fixed the rate in each instance after the order had been secured and notice thereof had been given to Catton but

before it had passed the rate charged by Catton, it would not follow that it could arbitrarily fix the rates or disallow them altogether years afterwards and after the close of the agency, nor does the plaintiff pretend that it had fixed any rates differently from those charged in Catton's various statements of account. If the question were merely one of reasonable rates to be determined by the court on all the evidence, a rate of 5 per cent, that is, the rate usually acquiesced in by the parties, would doubtless be considered reasonable.

Lastly, as to commissions charged by Catton on orders obtained by Macfarlane during the period when Catton claimed to be sole agent. It seems that during the latter part of this period, beginning perhaps about the end of 1897, Macfarlane obtained a number of orders for the plaintiff. Among these were four orders obtained in the latter part of 1898 and early part of 1899 shortly after the annexation of these islands to the United States, when there was a special impetus in business here, particularly in the starting of new plantations, and a special desire to procure steam plows and other machinery before the extension of the Federal tariff laws to the islands. Catton was kept informed by the plaintiff as to these four orders and before leaving the agency charged commissions upon them at the rate of 5 per cent. on the theory that he was sole agent at that time and entitled to commissions at that rate upon indirect orders sent through Macfarlane as well as through other channels. The commissions on these orders amounted to \$6,678.65. The plaintiff's contention is that commissions upon these orders were paid to Macfarlane as one of the two supposed co-agents and that Catton should now account for the sum charged by him on the same orders. It is unnecessary to decide whether Catton and Macfarlane were co-agents or not during the period in question, although this was one of the leading issues in the case and one to which a large portion of the evidence was directed, for if a co-agency did exist at that time the orders in question were direct orders, and Catton, with whom alone the plaintiff had dealt in con-

nection with the agency ever since 1893 so far as the accounts were concerned, would have been entitled, quite as much as Macfarlane, to charge or retain the commissions, and not only the commissions that he did charge, at the rate of 5 per cent., but commissions at the rate of 7 1-2 per cent., and the plaintiff did not pay Macfarlane his commissions on these orders or arrange for their payment to him until a year or so after Catton had charged the commissions and sent his statement of account to that effect to the plaintiff. Further, these commissions, whatever they amounted to, which is not clear, were allowed Macfarlane in the shape of spares held in stock in Honolulu and were special commissions allowed him as a matter of private arrangement with the plaintiff in consideration of special expenses incurred and services performed in connection with these orders. Under such circumstances the plaintiff ought not to be allowed to require Catton to refund the commissions received by him. In view of this conclusion, we prefer not to go into the question as to whether Catton was sole agent or not during the period in dispute. That question could not be treated satisfactorily except at considerable length, because of the great amount and conflict of evidence, and whatever conclusion we might have come to on this point if we had heard the case originally, it is at least very doubtful if we could under the circumstances, especially in view of the conflict and vagueness in the evidence, disturb the findings of the judge who did hear the case originally.

The decree appealed from is affirmed.

Robertson & Wilder for plaintiff.

Holmes & Stanley and *Kinney, McClanahan & Cooper* for defendant Catton.

No appearance for Macfarlane.

G. W. MACFARLANE *v.* R. CATTON.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED JANUARY 5, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., AND CIRCUIT JUDGES ROBINSON AND MATTHEWMAN IN PLACE OF HARTWELL AND HATCH, JJ.

ACCOUNTING—*bill for, dismissed on failure of plaintiff to account.*

One of two co-agents for the sale of goods upon commission who procures orders and receives commissions while excluded from the agency by the other who conducts it alone under an honest belief that he is sole agent, cannot require the latter to account in equity without also accounting himself.

HE WHO SEEKS EQUITY MUST DO EQUITY—*application of.*

Equity cannot act arbitrarily in the application of this maxim and generally will not as a condition of granting the plaintiff relief require him to do what the defendant would not be entitled to as plaintiff, but to the latter rule there are exceptions, of which the present case is one.

OPINION OF THE COURT BY FREAR, C.J.

This is a suit in equity for an accounting. The circumstances under which it arose are set forth more fully in *Fowler & Co. v. Catton and Macfarlane*, decided this day. The plaintiff and defendant were joint agents in Honolulu of John Fowler & Co., (Leeds) Ltd., of London and Leeds, England, until the end of 1893, and the plaintiff was sole agent after February, 1899. Between those dates the defendant conducted the agency alone and claimed to be sole agent with the consent and acquiescence of both the principal and his former

co-agent. The plaintiff contends that the co-agency continued, and seeks to have the defendant account for the commissions received by him during that period. The commissions were certain percentages upon orders obtained by the agents, also upon orders sent to the principal directly by third parties without the intervention of the agents, and also upon sales of machinery consigned to the agents by the principal. The commissions received by the defendant amounted to about \$28,000 for the period in question. During that period, more particularly during its latter portion, the plaintiff also procured orders for the principal and received commissions, the amount of which is not shown, but which may have equaled or exceeded the amount received by the defendant. The plaintiff did not offer to account for the commissions received by him but declined as a witness to state their amount until ordered to do so by the court, and then said that he could not tell without his books, which he believed were in San Francisco, and no offer or effort was made to obtain the books. At the close of plaintiff's case the circuit judge on defendant's motion dismissed the plaintiff's bill on the ground that, even if the co-agency continued during the period in question, the plaintiff could not require the defendant to account without also accounting himself, on the principle that he who seeks equity must do equity. In our opinion the decree should be affirmed.

The defendant no doubt excluded the plaintiff from the business during the period in question although he did this and continued the agency alone in accordance with what he honestly believed to be his authority and the rights of all parties. The plaintiff urges that inasmuch as the defendant wrongfully, as he contends, excluded him from the business, not only was he, the plaintiff, justified in doing what business he could on the outside, but that the defendant would be estopped from setting up a co-agency during that period and calling on the plaintiff to account for the commissions received by him and would therefore be estopped also from setting up by way of defense

that the plaintiff could not call for an account without also accounting himself. We will assume that if a bill for an accounting were brought by the defendant it could not be maintained.

In support of the theory that a defendant cannot rely upon the principle that he who seeks equity must do equity except where he would be entitled to relief if he were plaintiff, the plaintiff relies particularly on the statement of Vice-Chancellor Wigram in *Hanson v. Kcating*, 4 Hare 6, that, "as a general proposition,, it may, I believe, be correctly stated, that a plaintiff will never, in that character, be compelled to give a defendant anything but what the defendant might, as a plaintiff, enforce, provided a cause of suit arose." That statement is correct subject to various qualifications and exceptions that perhaps may be implied from the use of the word "general," but apparently both the vice-chancellor himself and some subsequent judges and writers have been inclined to treat that statement as if the word "general" had been omitted. The vice-chancellor himself, however, not only showed, perhaps inadvertently, from the illustrations he gave that there were qualifications and exceptions to the rule, but in that very case reserved his conclusion and on further consideration about a month later applied the exception rather than the rule—upon the authority of the case of *Sturgis v. Champneys*, 5 Myl. & Cr. 102, in which Lord Chancellor Cottenham said, more broadly, that "this court refuses its aid to give to the plaintiff what the law would give him, if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which this court could not otherwise enforce." In view of this the vice-chancellor must be taken to have meant to give due force to the word "generally" when in the subsequent case of *Neesom v. Clarkson*, 4 Hare 101, upon which also the plaintiff relies, he said: "I think it may be generally said, that, unless the equity which the defendant claims from the plaintiff is one which the

defendant might enforce by bill, it is not a term which the court has a right to impose on the plaintiff." Indeed, an examination of the earlier opinion shows that what the vice-chancellor had principally in mind was that the court could not "impose merely arbitrary conditions upon a plaintiff," simply "because he stands in that position upon the record." These cases are discussed in Pomeroy on Equity Jurisprudence, Secs. 385-386 and notes, in which the author takes the position that the broader statement of the chancellor is the correct one and says that the narrower statement of the vice-chancellor "is expressed in somewhat too strong terms, and requires important limitations upon its generality," and illustrates this by various examples. The conclusion is reached that "the rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant, which could not be obtained by him in any other manner—that is, which a court of equity, in conformity with its settled methods, either would not, or even *could* not have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff." In *Otis v. Gregory*, 111 Ind. 504, also relied on by the plaintiff, in which the court cites with approval the opinions above referred to of Vice-Chancellor Wigram, the court recognized that "there are cases which do not seem to fall within the foregoing principles" and cited the sections from Pomeroy above referred to. As a matter of fact, the court held in that case that the plaintiff should give the defendant the desired relief as a condition of having relief herself, holding, however, that the defendant would have been entitled to relief if he had been plaintiff. To the examples given by Pomeroy may be added that of a case in which a plaintiff may be required to grant the defendant relief even though the latter would be prevented by the statute of limitations from asserting his claim as plaintiff. *DeWalsh v. Braman*, 160 Ill. 415, citing Pomeroy with approval.

The plaintiff could not rightly solicit orders secretly and collect commissions thereon to the exclusion of the defendant

any more than the defendant could do the same openly to the exclusion of the plaintiff. If the plaintiff had accepted the defendant's theory of a dissolution of the co-agency, the payment and receipt of commissions obtained by him would be a matter between him and his principal, but proceeding as he does upon the theory of a continuation of the co-agency he cannot do business properly appertaining to such agency for his own private benefit and then call upon the defendant to account for his commissions without also accounting himself. That would be to seek equity without doing equity. The rule works both ways.

The decree appealed from is affirmed.

Robertson & Wilder for the plaintiff.

Holmes & Stanley and *Kinney, McClanahan & Cooper* for the defendant.

CECIL BROWN *v.* KATE BRAYMER.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MARCH 3, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF WILDER, J.

EVIDENCE—*order of proof.*

The order of proof rests largely in the discretion of the trial judge, not subject to review except in case of abuse, as, for instance, in admitting under certain circumstances oral evidence of the contents of a note before proof of its destruction.

PROMISSORY NOTE—*action at law on destroyed note without bond of indemnity.*

An action at law may be maintained on a note accidentally

destroyed by fire while in the possession of the payee and undorsed, and no bond of indemnity need be given in such case.

VERDICT—*may be directed for plaintiff, when.*

A verdict may be directed in favor of the plaintiff when he has clearly proved his case and the defendant has offered no evidence and made no attempt to contradict the plaintiff's evidence.

OPINION OF THE COURT BY FREAR, C.J.

This is an action upon a note made by the defendant payable to the plaintiff for \$350 and interest. The plaintiff proved not only the note, its non payment, etc., but also that after its maturity and while still in his possession and undorsed it was accidentally destroyed by fire. At the close of the plaintiff's case, the defendant offering no evidence, a verdict was directed for the plaintiff. The defendant brings the case here on a number of exceptions, which raise four points.

1. It is contended that the court erred in allowing evidence as to the contents of the note before its loss or destruction was proved. The plaintiff, however, offered this evidence for the purpose of identifying the note in order to make possible or facilitate subsequent proof of its destruction and undertook to make proper connections at a subsequent stage of the trial. The order of proof was a matter resting in the discretion of the trial judge not subject to review by this court except in case of abuse. There was clearly no such abuse in this case.

2 and 3. It is further contended that an action at law cannot be maintained on a lost or destroyed instrument; also that, if the law is otherwise on that point, such an action at least cannot be maintained except upon giving the defendant a bond of indemnity. In an action upon a note the defendant is entitled to the production and surrender of the note, but such production or surrender would be impossible in case the note were lost, and yet the payee ought not to lose his rights because the note was lost, provided the defendant could be sufficiently protected against being required to pay a second time at the suit of a holder in good faith for value. Such protec-

tion could be given by a bond of indemnity, but a court of law could not require the plaintiff to give such a bond as a condition of maintaining his action but a court of equity could, and, accordingly, as a rule formerly suits upon lost notes were required to be brought in equity. This rule has been changed in many jurisdictions by statute and in other jurisdictions it is held in the absence of statutory authority that courts of law as well as of equity may require a bond of indemnity as a condition of the entry of judgment and issuance of execution, as for example, in Massachusetts. *Schmidt v. People's Nat. Bank*, 153 Mass. 550. Whether, in case indemnity should be required, it would be proper to order a nonsuit upon failure to give such indemnity, as the defendant asked the court to do in this case, or the bond should be required, if desired by the defendant, merely as a condition of entering judgment and issuing execution, we need not say. It is now well settled that a bond is not required at all except in cases in which the defendant might be in danger of being subjected to a second action, and except in such cases there can be no objection to an action at law. If the instrument sued on has been absolutely destroyed and not merely lost, it not only cannot come into the hands of a bona fide holder for value but there would not even be the danger of the expense or annoyance of an action being brought upon it by a holder not in good faith or for value, and there would therefore be no occasion for a bond of indemnity and nothing to prevent the maintenance of an action at law. In many cases a bond is not required even when the instrument is merely lost and not destroyed, as, for instances, when it is not negotiable, or when, if negotiable, it has not been negotiated, or when, if negotiated, it has been negotiated by special endorsement, or when a second action upon it would be barred by the statute of limitations, or when one-half of the instrument, which had been cut in two for safety in mailing, is produced and the other half has been lost, since one-half of an instrument is not negotiable, and some courts

hold that no bond is required when the instrument was lost after maturity, because an action thereon by a subsequent holder would be subject to the defense of payment. See *Moore v. Fall*, 42 Me. 450; *Swift v. Stevens*, 8 Conn. 431; *Rowley v. Ball*, 3 Cow. 303; *Adams v. Baker*, 16 R. I. 2; *Palmer v. Carpenter*, 53 Neb. 394; *Des Art v. Leggett*, 16 N. Y. 582; *Thayer v. King*, 15 Oh. 242; *Dean v. Speakman*, 7 Blackf. 317; *Bank of U. S. v. Sill*, 5 Conn. 106. In the present case the note was destroyed after maturity while still in the possession of the payee and without having been endorsed. It is clear that an action could be maintained upon it at law without the giving of a bond of indemnity.

4. It is contended lastly that proof of destruction should be clear and satisfactory, that the question of destruction was for the jury and that the court erred in directing a verdict for the plaintiff. The evidence of destruction was clear and satisfactory in this case and no attempt was made to overcome it. A case, of course, should not be taken from the jury when there is any substantial evidence which would support a finding adverse to the party requesting a directed verdict, or when, if the direction is for the plaintiff, his evidence is not clear and satisfactory, but that a verdict may be directed in a clear case is well settled. In the nature of things, while verdicts directed for defendants are not uncommon, it is rare that a verdict is directed for a plaintiff. There is no reason, however, why this should not be done in a proper case and that it may be done is recognized by the authorities. See *Anthony v. Wheeler*, 130 Ill. 128; *Underwood v. Stack*, 15 Wash. 497. There is no reason why this should not be done here as well as elsewhere. Indeed, the court has gone further here in this general direction than in most other jurisdictions, as, for instance, in ordering judgment non obstante not only for the defendant as well as for the plaintiff but on the evidence as well as on the pleadings when the facts were undisputed.

Choy Look See v. Royal Ins. Co., 14 Haw. 14; *Boardman v. Fireman's Fund Ins. Co.*, 14 Haw. 28.

The exceptions are overruled.

Plaintiff in person; *W. A. Whiting* with him.

G. A. Davis for defendant.

IN RE ASSESSMENT OF TAXES, PACIFIC GUANO &
FERTILIZER COMPANY, APPEAL BY THE
ASSESSOR FROM TAX APPEAL COURT, FIRST
TAXATION DIVISION.

ARGUED MARCH 13, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF WILDER, J.

INCOME TAX—*loss not an actual loss at the time of writing it off to the account of profit and loss.*

The tax-payer in 1894 paid \$85,000 for Laysan Island guano rights, supposing that there were 84,000 to 85,000 tons of guano, and paid \$15,000 for stations there. It conducted the business of getting out and selling guano, making until July 1, 1904, losses in some years and profits in others, dividing in all \$60,000 dividends, but finally discovering that the guano bed was almost exhausted wrote off, shortly before July 1, 1904, \$50,000 to the account of profit and loss to be deducted from their income. Held: The loss resulted from an unfortunate investment at the outset, and did not actually occur at the time it was written off on the books of the tax-payer.

Statement of the case: The Pacific Guano & Fertilizer Company was a corporation organized for "exploiting the guano beds on Laysan island." It is obtained from an expert an estimate of the probable available guano there as 84,000 to

85,000 tons and in 1894 paid \$85,000 therefor. The account of the transactions concerning the guano shows losses until 1896, when the profits were \$17,106.05; 1897, \$10,336.41; 1898, \$3,883.58; 1899, \$4,942.77; 1900, loss, \$11,762.47; 1901, profit, \$11,481.24; 1902, \$9,623.87; 1903, \$10,549.23. The company paid \$15,000 for its stations. They finally discovered that "the guano bed was almost exhausted and there was only about one-half what the expert had estimated." Thereupon, shortly before making its income tax return for the year ending July 1, 1904, the company wrote off \$50,000 to the account of profit and loss, which sum they claim to be a loss properly deducted from their income. Their return for the year in question showed \$825,586.78, receipts from sales of the guano from the time operations were begun, and \$801,129.74 as deductions and exemptions, the difference of \$24,457.04 being returned as net income. The items making up the amount returned for deductions and exemptions include (2) interest paid within the previous year, \$1,359.07; (3) amounts expended in the purchase or production of the property (of which the sales were returned as above), \$629,748.47; (9) losses otherwise actually incurred during the previous year, \$50,000; (this is the item in dispute;) (10) necessary expenses actually incurred in carrying on the business or in managing the property, \$111,473.59; (11) taxes and license fees paid within the previous year, \$7,131.12; (12) royalty paid to the government for guano from Laysan, \$1,417.49. Schedule C of the return showed \$60,000 dividends paid. The assessor declined to allow the \$50,000 as a loss during the previous year, but the tax appeal court held that it was "an actual loss incurred in trade and is properly deductible under the income tax law," from which decision the assessor appealed.

The tax-payer claims that the loss of \$50,000 was impossible to ascertain before it was written off the books of the company in the taxation year, and that "until then no actual tangible losses could be demonstrated, it being merely estimated there might be a shortage of some 5,000 tons."

OPINION OF THE COURT BY HARTWELL, J.

We are unable to regard this loss as one which occurred during the year 1903, when it was written off on the books of the tax-payer. The guano had not depreciated in value; none of it had been lost. It did not exist to the extent supposed at the time of the purchase. The income from collecting and selling ceased when the deposits were removed. The loss which was finally ascertained upon the termination of that business did not occur at the time when it was learned that the guano supply had failed, but it occurred when the purchase money was paid. The transaction may be compared to the purchase of timber land on a supposition that it contained a larger amount of timber trees than upon examination it is found to contain. The annual income from getting out and selling lumber from the land, as long as there was any to get out, continued and was profitable in like manner as it would have been if the estimate of trees had been correct. The income ceased when the trees were taken off, but the loss was made at the time of the purchase. If the purchase price had been based on the actual and not on the supposed condition of the property there would have been no loss and the annual income from the business as long as it continued could not have been affected by the length of time that it could be carried on. In one sense a loss is made at the time when one learns that he has not got what he thought he had. In another sense, and as we think in the meaning of the statute, there is in such case no actual loss other than results from an unfortunate investment in the outset.

The decision of the tax appeal court is reversed.

A. G. M. Robertson for assessor.

Kinney, McClanahan & Cooper for tax-payer.

IN RE ASSESSMENT OF TAXES OF EWA PLANTATION COMPANY, LIMITED, APPEAL BY THE ASSESSOR FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

ARGUED MARCH 13, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN PLACE OF WILDER, J.

VALUATION OF SUGAR PLANTATION.

After considering the elements of value shown by the amount of sugar product during the previous four years, its cost and net returns and ordinary expense of keeping machinery and mill in order, five million dollars held to be an appropriate valuation for purposes of taxation.

Statement of the case: The property of the Ewa Plantation Company, Limited, was returned at \$4,000,000, assessed at \$5,448,000 and valued by the tax appeal court at \$4,400,000, from which valuation the assessor appealed. The tax appeal court valued the property by taking the selling price of its stock (250,000 shares at \$20), and deducting 20 per cent., as was done in the case of the *Rapid Transit & Land Co.* approved in 15 Haw. 3, adding outstanding bonds for \$400,000. The court in the case cited said: "The evidence fails to show that the valuation of the property by the tax appeal court was excessive or more than the full cash value thereof at the date of the assessment and the same is therefore affirmed." The attorney of the tax-payer in the present case submits that there is "no reason why the rule" (of twenty per cent. deduction from the market value of stock) "if applicable to the Honolulu

Rapid Transit & Land Company is not applicable to the Ewa Plantation Company." The brief of the tax-payer's attorney before the tax appeal court uses, however, the following language: "The attention of the members of the board of tax appeals is earnestly requested to the difference between an approval by the supreme court of this Territory of a method of ascertaining values used by the assessor, and a decision that such method is the only way to arrive at values. The former is what the court has done. It could not have done otherwise. If it had decided that such method was exclusive, the decision would have been useless for it is not the law as laid down in section 820 of the Civil Laws, and the legislature and not the court makes the law. The court decides indefinite and uncertain points in the law."

It appears that the net profits of the plantation for 1903 were \$758,519, of which sum only \$300,000 were paid out in dividends, the remainder having been used in erecting a mill and in various improvements on the plantation to keep up its earning capacity. According to the valuation by A. V. Gear in behalf of the assessor, the average profits for the previous four years were \$714,562, and \$70,000 written off from the capital added thereto would raise this sum to \$784,562, which is 14—77-100 per cent of \$5,311,861.88. The profit for 1903, \$758,519, added to \$70,000 written off from the capital would make \$828,519.11, being 14—77-100 per cent. of \$5,609.472.

The evidence of the plantation manager, Mr. Renton, is that the average yield had been 9 1-2 to 9 2-4 tons per acre as a whole and that the cost of production was "somewhere about \$35" per ton or "\$35 to \$37.50," and that the additional cost of marketing the sugar would be "not more than \$15." He further testified that "on a large plantation like Ewa to replace and fix machinery that has been disabled would take about \$100,000 a year." Mr. Spalding, of Spreckels & Company's bank, testified in behalf of the tax-payer as follows: "Ewa on the average has had exceptional crops for the past few years and notwithstanding that she has not been able to

pay over six per cent. dividends. It is true that it has reduced its floating indebtedness somewhat but crops have been exceptional and I don't think that a person buying the plantation would regard previous crops as a safe basis for future expectations. Ewa is a large plantation and has been a large dividend earner but it is not to be expected that Ewa will always continue as such. Take the case of Pahala, that was considered a good investment; stock sold as high as 275 readily, but the leaf hopper ravages have been tremendous the past year and, although there has been a good, high price for sugar temporarily, yet this does not necessarily mean a permanent high figure. Nevertheless I consider island securities good. Ewa stock is selling at twenty but the value of the stock on the market does not always represent the value of the property. There is a speculative feature about buying stock that raises it beyond the fair earning value of the property. I have had a great many experiences of that kind. I don't think that the fact that Ewa stock is selling at twenty, at par, would indicate that a purchaser of the plantation would buy it on that basis but at considerably less than that. The plantation would bring at par on all the stock \$5,000,000, but if one were to buy it he would have to take into consideration the future and if Ewa continues to earn six per cent. and there are good chances of her continuing to do so for the next ten years, it would be doing very well on that basis. I would not put the value of the property over four million dollars. I should think that any purchaser putting up that amount of money would not be willing to invest his money at a lower rate than seven per cent. The stock is only paying six per cent. He should have at least seven per cent., in fact—in fact my own opinion is that a person should have ten per cent. on a sugar investment, considering all the chances and even on a seven per cent. basis—I would amend that—I think a person should expect eight per cent. This would mean about \$4,000,000 capitalization on \$300,000 net profit." On cross-examination Mr. Spalding said he considered "in sugar properties profits earned but

needed to maintain the plantation upon a dividend earning basis are valueless so far as the direct earning power is concerned." In answer to the question on cross-examination, "Your best experience shows that where there are net profits of \$760,000 a year, that the corporation is not earning over seven or eight per cent.?" the witness answered, "I think if the property were put on the market the value would be determined upon its prospective earning power rather than what it had done in the past." The same witness further testified as to the taxable value of the plantation, "Although they may have \$921,000 in as a surplus, I don't think it is a taxable asset. As I understand it, the surplus goes entirely into the plantation to keep the plantation property on a dividend paying basis. If the money had been invested in outside securities then it might have been tangible for taxation purposes but, as I understand it, it is simply an account from which money is drawn to keep the plantation up to its present earning power. Nine hundred and twenty-one thousand dollars has been put back into the plantation in mills and railroad and other improvements in order that the earning power may not decrease. It is my opinion that Ewa has about reached her limit of development and that while it is carried as a surplus it will have to be put back into the plantation."

It appears from the tax-payer's return that its crop for the year 1903 was 33,214 tons. The assessor in valuing the property at \$5,448,000 says that he took the average net profits of the previous four years, amounting to \$761,723, and capitalized that at 12 1-2 per cent. with the result of \$6,093,784, from which he deducted fifteen per cent. or \$914,067.67, leaving a balance of \$5,179,716.40, to which he added the value of the bonds held by the tax-payer, \$400,000, making a total of \$5,579,716.40; that the board of equalization considered the standing, earnings, price of sugar January 1, 1904, probable unforeseen losses in crop, etc., and everything bearing on value of the plantation and finally agreed to assess the plantation at \$5,448,000, being the same assessment as in 1903.

Per curiam: It is impossible to lay down definite rules for valuing a sugar plantation. Possibilities of disasters and losses, low prices and increase of cost of production enter into the estimate of values of such properties, and when those things occur the values are reduced accordingly. After careful examination of the somewhat diverse methods of valuing the property which are shown by the records in this case, and upon full consideration of the elements of value shown by the amount of sugar produced in the previous four years, its cost and net returns, as well as the manager's evidence of the ordinary expense of keeping the plantation machinery and mill in order, we regard \$5,000,000 as an appropriate value to place upon the property for purposes of taxation.

The decision of the tax appeal court is modified accordingly.

A. G. M. Robertson for assessor.

Castle & Withington for tax-payer.

IN RE ASSESSMENT OF TAXES OF H. HACKFELD
& COMPANY, LIMITED, APPEAL BY THE TAX
ASSESSOR FROM TAX APPEAL COURT, FIRST
TAXATION DIVISION.

ARGUED MARCH 14, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF WILDER, J.

INCOME TAX—*loss not to be regarded as an actual loss to be deducted from income because written off—a loss written off on the books of the tax-payer in this case not a loss actually sustained during the year.*

The tax-payer, H. & Co., owned the stock of the Hawali Mill Co., Ltd., and its books showed a total indebtedness of this company

of \$384,000. Of this sum H. & Co. wrote off on its books to profit and loss \$150,000. The indebtedness of the Hawaii Mill Company was for advances since July, 1901, aggregating \$564,442, of which sum repayments had been made amounting to \$212,455. H. & Co. continued to make advances after writing off \$150,000. Held: The sum written off cannot be regarded as a loss "actually sustained during the year," nor did it become an actual loss by the mere act of writing off that sum to the account of profit and loss.

Statement of case: The case is thus stated in the tax-payer's brief:

"The loss in question in this case (\$150,000) arose by reason of advances to the Hawaii Mill Co., Ltd. It was shown that the total indebtedness of this company to the taxpayer was about \$384,000, that, in the taxation year and after a consultation among the directors of H. Hackfeld & Co., Ltd., and a careful examination of the assets of the company and the prospects for the payment of the whole amount advanced, it was decided that it would be impossible to expect a full reimbursement. The Hawaii Mill Co., Ltd., was practically insolvent, but in view of the prospects of its getting more land and the rising price of sugar, there was thought to be a chance that a portion of the large debt would be paid. So far as the deduction of \$150,000 (and perhaps a good deal more) was concerned, however, it was agreed by all that it at least would be an absolute and complete loss and that amount was therefore written off the tax-payer's books. There was also a verbal understanding between the tax-payer and the Hawaii Mill Co., Ltd., that the debt should be considered as so reduced. The evidence showed and the court found (even the dissenting commissioner) that the deduction was made honestly, in good faith and without any purpose of evading the tax laws. The funds in question were unquestionably advanced by the tax-payer and absolutely no evidence was put on by the assessor to controvert the claim that an actual loss was suffered amounting to at least \$150,000 and perhaps to a great deal more.

"In discussing a somewhat similar case this court said in

15 Haw. at p. 502: 'As to whether particular losses have occurred in a particular year or in some other year, it is sometimes difficult to say. *More or less latitude should be allowed as to when debts, for instance, have become worthless.* Probably a worthless debt could not be held to be written off in whole or in part in subsequent years for the purpose of evading the income tax law.' And on page 505 in discussing the question as to when a claim becomes worthless, the court says: 'The testimony shows that it was absolutely worthless then (referring to a previous period) but that up to the time or not long before there was some chance that the embarrassed company might pull through. In our opinion the decision of the tax appeal court allowing deductions should be affirmed.' This quotation comes very close to covering the case at bar, save that in the present case it does not appear that there was any previous certainty that the debt was worthless.

"The testimony of the deputy assessor fully sustains that of the tax-payer. He went carefully over the situation and satisfied himself that there was a bona fide loss (T. p. 6.) The court will note that cases where the assessor and tax-payer are in agreement, as in the cases in which we appear, are rather rare and we think this fact entitled to due consideration.

"Counsel for the assessor make two contentions (1) That the debt was worthless before and (2) That it is not worthless. While these positions seem a trifle inconsistent we will deal with them as they are made.

"The question of a 'voluntary abandonment' hardly needs discussion. It is almost impossible to conceive of a case where a party will throw away \$150,000, knowing that it will be a total and absolute loss. It may be that the debt became bad before the year in question, but the tax-payer did not so consider it and claimed no deduction for it. As this court has pointed out, considerable latitude must be allowed in deciding when a debt is bad. Plaintiff's testimony shows that it did not write the amount off until it was sure that it was a loss (T. 24), and it would be a harsh ruling indeed and not an allowance of considerable or any latitude to hold that this loss occurred previously. There is also absolutely no testimony to show any 'investment of capital,' as counsel calls it.

There was a loan pure and simple. The fact that the tax-payer owns the stock of the Hawaii Mill Co., Ltd., can make no possible difference. A corporation is an entity entirely distinct and separate from its stockholders.

"Counsel's next contention is that no loss has yet been suffered and this was the view taken by Commissioner Lansing in his dissenting opinion. We submit that it is untenable. Both the tax-payer and the assessor, after carefully examining the situation were convinced that the loss had occurred, the amount has been written off the books of the tax-payer and it has further agreed with the Hawaii Mill Co., Ltd., not to enforce the claim, knowing that it would be useless. The fact that no suit has been brought to collect is wholly immaterial. There is still a tremendous amount owing to the tax-payer, and to obtain a judgment would ruin the Hawaii Mill Co., Ltd., probably force it into bankruptcy and gain nothing for the tax-payer, if indeed it would not cause a still more serious loss. Counsel's claim that there is an attempt to evade the tax laws is expressly controverted by the evidence and by the decisions of all three of the commissioners. A person is not likely to wipe an item of \$150,000 off the slate when there is a possible chance of collecting it. And in this case it is at least noteworthy that the assessor was unable to put on any evidence to substantiate the claims of his counsel. The evidence probably shows that a good deal more than \$150,000 was lost and we submit that any attempt at evasion would not have stopped with this sum.

"The fact, somewhat relied on, that the tax-payer is still making advances seems to us to be a minor factor in the case. If it suddenly shut down the debtor would probably go to pieces and an even greater loss would ensue. If Hackfeld & Company are making profits in some branches of its business, as contended, and losing them in others, it is simply a stand off and presents no reason why it should be taxed, when the sum total shows a loss."

The assessor's contention is thus stated:

"Our objections to the allowance of this item are (1) that the alleged loss did not occur within the taxation year, and, (2) that it was not proven to be a bad or worthless debt.

"The evidence shows that this item was on arbitrary amount written off to profit and loss, being a portion of an open book

indebtedness of Hawaii Mill Co. to Hackfeld & Co. for merchandise sold and cash advanced to the former. A statement of Hackfeld & Co. filed in evidence shows that advances made since July, 1901, aggregate the sum of \$564,442, and repayments aggregating the sum of \$212,455. And the evidence is that Hackfeld & Co. continue to make advances.

"There is no evidence that there was any change of conditions with respect to this account during the taxation year. If the Hawaii Mill Company is insolvent now, it was insolvent more than a year ago. And we take it that money or merchandise furnished to a concern known to be insolvent cannot be claimed to be a loss. It would be nothing more than a 'voluntary abandonment,' which, according to the decision in the *Hawaiian Commercial Co.* case (14 Haw. 601), is not deductible. A tax-payer cannot throw away his money and then claim that he has sustained a loss within the meaning of the income tax act. The \$150,000 written off was a part of an indebtedness running back over a number of years. The loss did not occur within the past year. If the Hawaii Mill Co. was not insolvent when these advances were made, there having been no particular change of conditions since, it is not insolvent now. In this view of the case, this was not a matter of 'voluntary abandonment,' but an investment of capital. The evidence shows that the Hawaii Mill Co. is a corporation whose entire stock is owned by H. Hackfeld & Co., thus indicating that Hackfeld & Co. have simply taken a large amount of the profits made out of some branches of its business and invested them in another branch of its business. In so far as any of these advances were used in necessary running expenses of the plantation, they would be deductible in the Hawaii Mill Company's return.

"We further contend that as the Hawaii Mill Co. is a going concern having assets consisting of mill, crops, implements, leasehold and fee simple lands, and no attempt having been made to enforce collection of the debt, it should not be held to be worthless or bad, and therefore, deductible as a loss. This court, in its decision in the *Income Tax Cases*, 15 Haw. 502, said that while more or less latitude should be allowed as to when debts have become worthless, yet a debt could not be written off in whole or in part in subsequent years for the purpose of evading the income tax. The court also made an observation that is applicable to this case. 'While, as already stated, some

discretion must be allowed business men in determining when a debt becomes bad and should be written off, it seems that in this instance no attempt was made to collect that amount and it was apparently as clearly worthless before July first as after that.'

"We contend that the burden was upon the tax-payer to prove its right to make the deduction as claimed and that it has failed to sustain that burden with satisfactory evidence. We submit therefore that the assessment should be sustained."

Per curiam: The tax-payer's deduction from its income for the year 1903 of the sum of \$150,000 by reason of its estimate of the loss in respect of the Hawaii Mill Company, which it owns, cannot be regarded as a loss "actually sustained during the year." Sec. 1281, R. L. This estimate of the loss did not become an actual loss by the mere act of writing it off to the account of profit and loss, and it cannot be allowed.

The decision of the tax appeal court is modified accordingly.

A. G. M. Robertson for assessor.

Kinney, McClanahan & Cooper for tax-payer.

IN RE ASSESSMENT OF TAXES OF OAHU RAILWAY
& LAND COMPANY, APPEAL BY THE TAX-
PAYER FROM THE TAX APPEAL COURT, FIRST
TAXATION DIVISION.

ARGUED MARCH 14, 1905.

DECIDED MARCH 27, 1905.

HARTWELL, J., AND CIRCUIT JUDGES DE BOLT AND ROBINSON
IN PLACE OF FREAR, C.J., AND WILDER, J.

TAXATION—*separate interest in land.*

E. P. Co., Ltd., owning a sugar plantation on a large tract of land of which it had a leasehold interest, was taxed for the plantation and leasehold interest as for an enterprise for profit. O. R.

& L. Co. having subleased to E. P. Co., Ltd., the land, being 7,844 acres of large tracts of land leased to O. R. & L. Co. by the reversioners, the sublease being for a term one month short of the term of the original lease, and receiving in lieu of rent from E. P. Co., Ltd., four per cent. of its annual sugar product, amounting in 1903 to \$75,000 and netting the O. R. & L. Co. about \$44,000 after payment of its rent to the reversioners, the interest in the land held by O. R. & L. Co. was taxed at \$240,000; the reversioners being also taxed for the value of their interest and E. P. Co., Ltd., being taxed for its plantation and leasehold interest as for an enterprise for profit. Held: The taxation of E. P. Co., Ltd., and of the reversioners for their several interests did not include the taxation of O. R. & L. Co. for its interest, and the owners of the several interests in the land were properly taxed for the separate values thereof.

Statement of the case: The assessor valued the tax-payer's interest in the property in question at \$240,000, the tax-payer claiming that its interest had no taxable value. The tax appeal court sustained the assessor's valuation and the tax-payer appealed. The following is the decision of the tax appeal court:

"The appellant as lessee has an assessable interest which does not appear as having been assessed against the Ewa Plantation Company, Ltd., in its assessment as an enterprise for profit.

"The appellant leases from the Campbell Estate 40,000 acres of land at an annual rental of \$40,000, an average of one dollar per acre.

"The appellant subleases a portion of said land, amounting to 7,844 acres, to the Ewa Plantation Company, Ltd., which is the land in question.

"The evidence shows that in 1903 the appellant received from the Ewa Plantation Co., Ltd., a share of its profits the equivalent of rental, on the land in question, amounting to \$75,000.

"In making a liberal estimate of the net profits to the appellant from the land in question the court is of the opinion that the assessment made by the assessor of \$240,000 is a fair assessment. The court, therefore, sustains the assessor in his assessment of \$240,000."

The tax-payer's return makes the following statement:

"All the interest of the Oahu Railway & Land Company in that portion of the land occupied by the Ewa Plantation Co.

having been assessed to said Ewa Plantation Co. as an enterprise for profit, no interest remains to be assessed to the Oahu Railway & Land Co."

The assessor relies upon the statute which requires that "the interest of any person in any real or personal property shall be assessed separately, * * * and every person shall be liable to taxation in respect of the full value of his interest in such property," and also upon the provision of the statute that every person shall make a return of all his interest in any property. The return of the Ewa Plantation Co., as claimed by the assessor, "does not show that it is returning and paying taxes on property which it does not own." For the previous five years the average annual receipts by the tax-payer from the Ewa Plantation Co. were a little over \$75,000. The assessor's expert estimates that the tax-payer nets out of this lease, as far as Ewa is concerned, about \$44,000 annually.

In 1889 James Campbell leased to B. F. Dillingham large tracts of land upon the island of Oahu known as Honouliuli and Kahuku for a term of fifty years, which Dillingham assigned to the Oahu Railway & Land Co. That company assigned to W. R. Castle by a sublease 7,844 acres of the Honouliuli land, Castle assigning this sublease to the Ewa Plantation Co., Ltd., which is required by the terms of the agreement to pay to the Oahu Railway & Land Co. four per cent. of its annual product of sugar by way of rental. The sublease retains in the Oahu Railway & Land Co. the final month of the fifty years' term. Each of the different interests, namely, the Campbell Estate, the Oahu Railway & Land Co. and the Ewa Plantation Co. is separately assessed for its interest and pays taxes therefor, the property of the Plantation Co. being treated as an enterprise for profit. It is claimed in behalf of the Oahu Railway & Land Co. that "all these assessments are void" and that the lands included in Ewa Plantation "should be assessed as one entire tract and a value put upon it." It is further claimed by the tax-payer that "the only interest which the Oahu Railway & Land Co. has in these lands is a reversionary interest of one month at the end of

forty-nine years and eleven months, which is an interest which has very little value. No rent is to be paid but instead of rent the Oahu Railway & Land Co. is to receive a share of the profits of the Ewa Plantation Co. It seems to us that that value is estimated in the Ewa Plantation Company's assessment, and whether it is or not, it is an interest in an 'enterprise for profit' and is a share of that enterprise and not of land."

Per curiam: The tax-payer's interest was properly assessed and was not over-valued by the assessor or by the tax appeal court. This interest of the Oahu Railway & Land Co. had not entered into the valuation of the Ewa Plantation and had not been taxed as a portion of its property.

The decision of the tax appeal court is affirmed.

A. G. M. Robertson for assessor.

Castle & Withington for tax-payer.

IN RE ASSESSMENT OF TAXES OF WILDER'S
STEAMSHIP COMPANY, APPEAL BY THE TAX
ASSESSOR FROM THE TAX APPEAL COURT,
FIRST TAXATION DIVISION.

ARGUED MARCH 14, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF WILDER, J.

INCOME TAX—cost of replacing a steamer which became unserviceable under requirements of Federal inspectors not a loss to be deducted from income.

The tax-payer built a steamer, the "Mokolli," in 1878 at a cost of \$18,500. The steamer was in constant use until January, 1902, when she made her last trip. In August, 1903, the Federal inspectors required extensive repairs before renewing her certificate.

She was shortly afterwards broken up. The assessor refused to allow the tax-payer's claim of \$18,500 as a loss to be deducted from its income and allowed only \$1,000. The tax appeal court allowed the tax-payer's claim on the ground that it was a deductible loss from the income. Held: The steamer was not lost, nor was there a loss which for purposes of taxation is to be measured by estimated earnings which the steamer might have made if continued running, nor by the cost of replacing it with a new steamer.

STATEMENT OF THE CASE.

The assessor's brief thus presents the case:

"In this case the tax-payer claimed a loss in its income tax return of the sum of \$18,500 under the head 'losses incurred in trade.' The assessor allowed \$1,000 and this appeal involves \$17,500, which the tax appeal court allowed. The assessor appeals.

"It appears that in 1878 Wilder's Steamship Company built a steamer called the 'Mokolii' at a cost of \$18,500. The vessel was in constant use until January, 1902, when she made her last trip. She was examined by the Federal inspectors in August, 1903, and they notified the company that it would have to make extensive repairs to the vessel before they would renew her certificate. The vessel was shortly afterwards broken up. The average life of a steamer is twenty years. We make the following contentions: (1) That this is not a case of 'loss' but only of depreciation. (2) That if it was a 'loss' it was a loss of capital, not income, therefore not deductible. (3) That if it is a deductible loss, only the actual value of the vessel on July 1, 1903, could be allowed, and that did not exceed the sum which the assessor allowed, to wit, \$1,000.

"We presume that the court would take judicial notice of the fact that a steamer will gradually depreciate in value as time goes on, and we have the testimony of Mr. Wight that this particular steamer did constantly depreciate from the time she was built. In 1903 she had survived an average lifetime by five years.

"Depreciation is not deductible as a loss. *H. C. & S. Co. v. Assessor*, 14 Haw. 601, 607. The steamer 'Mokolii' represented an investment of capital. If she was lost it was a loss of permanent capital, not even floating or working capital, and much less income. We submit that such a loss is not deductible under

our statute. If, under the circumstances, this can be considered a loss at all only so much of it as occurred within the taxation year can be allowed. The value of the vessel on July 1, 1903, would be the maximum allowance. What was that value? Mr. Wight testified that the loss was claimed to be \$18,500 because that was the original cost of the boat and 'she could do all of the work required up to the time she was condemned.' But he also said that 'the last time that she was surveyed by them, (the inspectors), they notified us that unless we made repairs in the hull, boiler and machinery such that the cost of repairs would be more than the cost of a new vessel they would not renew the certificate.' He also said that 'she was absolutely unsafe for use either as a freight vessel or a passenger vessel.' When asked what was her actual, intrinsic worth on July 1, 1903, he said, 'I cannot tell you.' The evidence further shows that the 'book value' of the 'Mokolii' was \$1,333, and that that amount was written off to profit and loss when the vessel went out of existence. It is also in evidence that in its property tax return for 1901 the company returned the value of the 'Mokolii' at \$5,000, and in 1903 she was returned at the value of \$1,000.

"We contend that the burden of proving the amount of an alleged loss is upon the tax-payer, and that of the evidence adduced in this case that entitled to the most weight is the company's sworn tax return showing that on January 1, 1903, the actual value of the vessel was \$1,000. The losses contemplated by the income tax act are 'actual' losses. The theory upon which the company proceeded in fixing the amount of loss in this case at the original cost of the steamer twenty-five years ago is absolutely untenable.

"Counsel for the tax-payer relies on the case of *H. C. & S. Co. v. Assessor*, 14 Haw. 601, quoting that 'in computing income the necessary expenses actually incurred in carrying on any business shall be deducted. This provision of the statute might apply if the old mill had given out so that it was practically necessary to erect a new mill on that account. The amount expended in the new mill up to the extent, not merely of the value of the old mill, but of the amount that would be required to put the old mill in good repair or to replace it, might perhaps be deducted as an expense.' The tax court cited the case of *Grant v. Railroad*, 93 U. S. 225, where it was held that the cost of replacing a wornout bridge with a new one should be classed as 'repairs' and not 'profits used in construction.' We submit

that neither the quotation made by counsel from the *H. C. & S. Co.* case nor the ruling in the *Grant* case are in point. A sugar mill is only a part of a larger scheme, to wit, the plantation, just as a vacuum pan, for instance, is a part of the mill. and when a part wears out and is replaced by a new one it is merely a matter of 'repairs.' A bridge is only a part of the railroad system to which it belongs. The replacing of the part is only 'repairs.' But a steamer, at least the steamer in question, is a complete thing in itself, and is not a part of a larger machine. When an old steamer has survived its usefulness and becomes worthless and a new one is purchased, it is not 'repairs' but a new investment of capital.

Under our statute (section 4) it is not every expense incurred in carrying on a business that is deductible, for it is expressly provided by that section that amounts paid out for new buildings, permanent improvements or betterments shall not be deducted. The purchase of a new steamer, though considered a necessary expenditure in conducting the business would no doubt be held to be a permanent improvement. Here, the claim is not for the cost of the new steamer but for the value of the old one which the evidence shows had survived its usefulness.

"We submit that the assessor was more liberal than he should have been when he allowed the deduction of \$1,000. The assessment should be sustained."

The tax-payer submits that "the 'Mokolii' was as capable of revenue production in her last year as she was in her first. The tax-payer's contention is that the total original cost of the steamer was a proper deduction and that her value on the books of Wilder's Steamship Co. is no criterion of the amount to be deducted under the income tax law. * * *

"The principles to be applied in deciding cases under the income tax law are very different from those which are to be applied in regard to direct taxation. Under direct taxation an increase or decrease in the value of property may be considered, while this consideration has little if anything to do with the income tax. The question under the latter law is in substance, What is a man's *net* income during the taxation year? or rather that is what the question becomes after the provisions of Revised Laws, Sec. 1281, have been applied. This distinction is very material in this case. The value of the 'Mokolii' on the books of the company was \$1,333, which was also practically the

value for direct taxation. She was, however, still earning the full income on her cost of \$18,500 and hence the depreciation could not be deducted under the income tax law until her earning capacity should be destroyed. *The law is so framed that the final accounting between the tax-payer and the government comes only when the actual tangible loss occurs, and when this accounting does come, the tax-payer is entitled to a full deduction for all amounts necessarily expended in keeping the business on the same footing as previously maintained.* This point is well illustrated in two cases. In *H. C. & S. Co. v. Tax Assessor*, 14 Haw. 601, the supreme court fully recognizes that it is practically the only net income of an enterprise which is subject to the tax, and that all expenditures in carrying on the business, all amounts spent for repairs, and all sums expended for keeping the plant up to a full working condition are properly to be deducted from gross receipts. The court refused to allow a deduction for an old mill, which was in good working condition, simply because the company found it convenient to erect a new and more efficient one, because the property on which a loss was claimed was still in hand and fit for work, but on page 689 (on rehearing) the court said:

“In computing income, the necessary expenses actually incurred in carrying on any business,’ etc., ‘shall be deducted. *This provision of the statute might apply if the old mill had given out so that it was practically necessary to erect a new one on that account. The amount expended in the new mill up to the extent not merely of the value of the old mill, but of the amount that would be required to put the old mill in good repair or replace it, might perhaps be deducted as an expense.*”

“In the case at bar there has been no voluntary abandonment of the ‘Mokolii,’ as there was of the old mill. She was absolutely gone out of commission and no longer exists so far as the enterprise known as Wilder’s Steamship Co. is concerned.

“Another instructive case is *Grant v. R. R.*, Fed. Case 6159, 93 U. S. 225. There an old bridge on a railroad was replaced by an expensive and elaborate one, just as in this case the ‘Mokolii’ was replaced by the more expensive and elaborate ‘Likelike.’ The cost of replacing the old bridge less the value of the materials of it which were left was held to be a neces-

sary expense and properly deductible. The United States Supreme Court says on page 228:

"The counsel for the government insists that this bridge was a betterment, because it was much more valuable than the old wooden bridge. But the assessor did not include the excess merely: he assessed the whole expenditure bestowed upon the new bridge without making any allowance for the old one. His idea seems to have been, that all earnings used in new constructions are made taxable by the act without reference to betterments, or to their being substituted for other constructions. Indeed his assessment is not for 'profits used in construction,' but for 'earnings used in constructing new Windsor bridge, \$55,712.60.' In this view he was decidedly wrong. *Earnings expended on a new structure may or may not be profits. Whether they are or not depends on other things to be taken into account besides the mere fact of such expenditure. Had the assessment been merely for the increased value of the new bridge over the old one when in good repair, the case might have admitted of very different consideration.*

"It would be hard to find a case much more strongly in point. * * * The 'Mokolii' running between certain ports is as much a part of the system of the tax-payer's steamship line as a bridge or a mill is of a railroad or a plantation. Possibly there is a slight difference in degree, but none in the real principle applicable to the case. A railroad must have bridges, a plantation must have a mill and a steamship line must have sufficient steamers for its traffic. It is true that the building of a new steamer for \$100,000 is not a loss up to that amount, but, as the cases cited aptly show, it is a loss up to the amount necessary to replace the old steamer, i. e., \$18,500. To deduct this is not to deduct the cost of a permanent improvement or betterment, but to deduct an actual loss. Suppose a steamer is purchased for \$5,000 and her anticipated life is five years. Each year the vessel earns \$5,000 and \$2,500 is spent in repairs. Thus \$25,000 is earned and \$12,500 is spent, leaving an apparent net income of \$12,500. There has, however, been an actual deterioration of the intrinsic value of the boat in each year of her service. This the law does not allow to be deducted from income, but it postpones the date of the deduction to the date when an actual tangible loss appears. Thus, while there has been an apparent net income of \$12,500 for the five years, the time has come at

the end of them when a new boat will have to be built, not to increase the efficiency of the fleet of the company, but merely to maintain it in its normal condition. Therefore the apparent net income of \$12,500 must necessarily be reduced by the full actual cost of the vessel because that is one item of expense which has been incurred in making the total gross earning of \$25,000. The \$5,000 originally paid is thus a proper deduction from the gross income of the year in which the loss is made, for the reason that it is as much an item of expense as the payment of the crew or the bill for fuel. The amount of the original purchase has been actually expended in earning the gross revenue of \$25,000. The cost of the 'Mokolii' is of course not originally deducted, because it is a betterment, but the tax-payer is not to be compelled to pay for it twice and therefore when the same amount has to be expended in replacing or repairing it, the deduction is properly allowed. It might be fairer to allow the actual deterioration to be deducted from the income each year, but this is not the purpose nor intent of the law, nor would it be always easy of ascertainment. And it is for this reason that the 'book value' of the vessel, which is based on such actual yearly deterioration is wholly immaterial. Each year the stockholders have been paying by way of decreased dividends the actual cash value of the vessel, by means of which a sinking fund has been accumulated, the entire amount of which will have to be expended for the purchase of a new boat to replace the old one. If the 'Mokolii' had been retained in commission after the purchase of the new boat, the case would permit of very different consideration. But the reverse of this is the case. The new boat has taken the place of the 'Mokolii,' and that steamer no longer exists either as a revenue producing asset or otherwise."

Per curiam: There are undoubtedly losses of capital which, in the meaning of the income tax statute, are properly deducted from receipts in estimating net income. It is not as easy to classify such losses as it is to show whether specified instances are within the meaning of the statute. In this case the steamer "Mokolii" was not lost, whether in consequence of the requirements of the Federal inspectors or because, as stated in the testimony of the president of the company, the steamer had become "absolutely unsafe for use either as a freight vessel or

as a passenger vessel." The company could make no further use of its steamer and obtained by breaking it up and selling it its actual value, which is shown to have been less than \$1,000. This is not a loss which for the purpose of taxation is to be measured by the estimated earnings which the steamer might have made if it could have continued running; nor was it a loss to be measured by the cost of replacing it with a new steamer. Whether the cost of the steamer that was built to take the place of the "Mokolii" up to the amount that would have been required to put the "Mokolii" in repair could be allowed as an expense as distinguished from a loss within the meaning of the statute we need express no opinion, as the evidence does not show whether the new steamer was obtained during the year in question.

The decree of the tax appeal court is modified accordingly.

A. G. M. Robertson for assessor.

Kinney, McClanahan & Cooper for tax-payer.

MELE K. NOTLEY v. CECIL BROWN AND ANTHONY LIDGATE, EXECUTORS AND TRUSTEES, EMMA DANFORD AND H. G. DANFORD HER HUSBAND, GRANVILLE R. N. H. DANFORD (a minor), MARIA HUGHES AND THOMAS H. HUGHES HER HUSBAND, MARIA NAWAHI (nee Hughes), HENRY HUGHES (a minor), EMMA HUGHES (a minor), CLARENCE HUGHES (a minor), CHARLES HUGHES (a minor), WILLIAM N. HUGHES (a minor), DAVID NOTLEY AND HELEN KAMALU NOTLEY HIS WIFE, WILLIAM NOTLEY AND MELISA NOTLEY HIS WIFE, CHARLES NOTLEY AND EMMA NOTLEY HIS WIFE, JOHN NOTLEY AND ANNA NOTLEY HIS WIFE, VICTORIA MARIA KEALA NOTLEY, LILY NOTLEY (a minor), AND WILLIAM K. NOTLEY (a minor).

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.

ARGUED MARCH 15, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

DOWER IN PERSONALTY.

Expenses of administration should be deducted before widow's dower is apportioned out of her husband's personal estate under Revised Laws, Sec. 2271.

Expenses, if reasonable, incurred by executors in proceedings to contest will of decedent are expenses of administration.

OPINION OF THE COURT BY WILDER, J.

This is an appeal from a decree admeasuring dower to Mele K. Notley under Sec. 2271 of the Revised Laws, which provides as follows: "Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for the term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts." (C. C. 1859, s. 1299; Cp. L. s. 1299; C. L. s 1906.) There are but two questions involved.

1. The first question to be decided is, whether the expenses of administration of the estate should be deducted before the widow's share is apportioned out of her husband's personal estate. The circuit judge was of the opinion that, as the common law rule that expenses of administration take precedence over debts is in force in this Territory, the payment of debts could only be made after the expenses of administration, and consequently the widow takes her portion after the payment of debts and debts are subject to the payment of expenses of administration.

Section 1846 of the Revised Laws makes it the duty of a person named as executor in a will to apply for probate of such will. That being so, the executor should be entitled to charge against the estate the reasonable expenses of doing something which the law says he shall do, and the payment of such expenses should be postponed until after the payment of debts of the decedent.

The statute in question is a statute of dower and not of descent. *Carter v. Carter*, 10 Haw. 687. The "debts" referred to in the statute do not include any claims against the estate arising after decedent's death, such as funeral charges,

expenses of administration and the like. *Schouler on Executors and Administrators*, Secs. 421-426. The question at issue is not so much whether debts include expenses of administration, as it is whether the widow gets her share of the personalty only after the payment of the debts or after the payment of the expenses of administration and the payment of the debts.

In the absence of any statute in this Territory settling the priority of payment of claims against estates of decedents (*Grace v. Smith*, 14 Haw. 144), the rule at common law will be followed, which is that expenses of administration take precedence over debts of decedent. *Schouler on Executors and Administrators*, Sec. 423; 4 Bacon's Abridgement, 105; 2 Williams on Executors, 988. Under that rule the expenses of administration must be paid before the debts, and as the widow is not entitled to her share until after the "payment of all just debts," the payment of which debts is subject to the payment of expenses of administration, there is no error in that part of the decree appealed from.

One of the objects of requiring the probate of wills and the administering of estate is to provide for the due classification and adjustment of all claims and debts against estates. Until an estate is probated, which of necessity involves expenses of administration as an incident thereto, how can it be known with certainty that all just debts have been paid, after which only is the widow entitled to her share in the personalty? A widow is only entitled to her share in the personalty after the payment of expenses of administration and after the payment of all just debts of the decedent.

2. The second question presented for consideration is, whether the expenses incurred by the executors in proceedings to contest the will of the decedent are expenses of administration. The circuit judge held that, inasmuch as the expenses of such contest were created in a measure by the widow herself, who was one of the contestants, it would be inequitable to compel the successful proponents of the will to bear the entire expense of such a contest. As before stated,

it is the duty of a person named as executor in a will to offer the same for probate (Revised Laws, Sec. 1846), and any ordinary and reasonable expenses incurred by him in performing such duty are undoubtedly expenses of administration.

The point is, whether extraordinary expenses, such as were incurred by the executors in successfully defending the will after a hard fought and bitter contest, should also be allowed as a part of the expenses of administration and be chargeable in part to the widow. The authorities are somewhat in conflict on this matter. In the case of *Hazard v. Engs*, 14 R. I. 5, 8, it is said: "In *Bradford v. Boudinot*, 3 Wash. C. C. 122, the court say: 'The executor, believing the paper under which he acts is the last will, is authorized, and it is his duty to support the first probate, and he is entitled to retain the expenses of the litigation out of the estate.' See also *Enloe v. Sherrill*, 6 Ired. 212; *Stebbins v. Lathrop*, 4 Pick. 33; *Smith v. Moore*, 6 Me. 274. In *Wills v. Spraggins*, 3 Gratt. 529, 542, the court state the law as follows, to wit: 'The ecclesiastical courts, as is well known, have jurisdiction only of wills of personalty, and regard the executor named as the only proper person to propound the will for probate, whether voluntarily or upon the citation of others interested in the subject. He is the representative of the will, and of all interests created by it, and, moreover, the legal owner of the testator's personal estate. It is, therefore, his right and his duty to obtain for the instrument the sanction prescribed by law.' And the law is laid down in similar language by the supreme court of Alabama in *Henderson v. Simmons*, 33 Ala. 291, 299. 'It is the privilege,' say the court, 'if not the duty, of one named as executor of a paper purporting to be a last will and testament, to propound it for probate. If he have no knowledge or reasonable ground on which to predicate a well-grounded suspicion against the legality of the will, and propound the paper in good faith, he but carries out the intention with which he was appointed. Any reasonable costs and expenses incurred by him in the honest endeavor to give effect to the will, is a proper charge on

the estate in his hands.' This seems to be not only good law but also good sense; for the will may contain gifts to persons who are either not yet in being or not yet ascertained, and who, therefore, cannot protect themselves, and whose rights might be sacrificed by a rejection of the will, unless the executor should take on himself the duty of establishing it."

The rule announced in this last case, namely, that any reasonable costs and expenses incurred by executors in probating a will, even if contested, is the one which should be followed in this Territory. But these expenses should be reasonable. There is no question but that the executors in this instance acted in good faith.

The record on this appeal does not disclose the amount of expenses incurred by the executors in the proceedings to contest the will, and which they either have been or ask to be allowed as part of the expenses of administration. On this point we would say, however, that estates of decedents should be protected and conserved for the benefit of all concerned and not slaughtered or wrecked. And it is the duty of the courts before whom these estates come for settlement or review to see that they are protected in every instance irrespective of whether any objection is made by any of the interested parties or not. The practice or regarding estates coming before courts for review or settlement to be the legitimate prey of all who come in contact therewith should never for one moment be tolerated in this Territory.

The decree appealed from is affirmed and the case is remanded to the circuit judge of the fourth circuit for such further proceedings as may be proper not inconsistent with this opinion.

Kinney, McClanahan & Cooper and S. H. Derby for plaintiff-appellant.

Holmes & Stanley for respondents-appellees.

CLARENCE W. ASHFORD *v.* HONOLULU RAPID
TRANSIT & LAND CO., A CORPORATION.

APPEAL FROM DISTRICT COURT, HONOLULU.

ARGUED MARCH 17, 1905.

DECIDED MARCH 27, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

STREET RAILROAD—*passenger's rights.*

After defendant accepted plaintiff as a passenger on a trailer attached to a motor car and took his fare and provided him with a seat, held, under the circumstances of this case, it had no right to detach the trailer from the motor car before plaintiff's destination was reached and insist on plaintiff proceeding in the motor car unless it furnished to plaintiff as good accommodations in the motor car as he had had on the trailer.

OPINION OF THE COURT BY WILDER, J.

On December 24, 1903, at about 5:50 p. m. at the corner of King and Alakea streets, Honolulu, plaintiff boarded a trailer car of defendant company with ample seating capacity for passengers, which trailer was without motor power and was attached to a motor car, said cars proceeding easterly on King street. Every seat in the motor car was occupied and many passengers were standing both inside the car and along the footboards outside. The conductor of the trailer notified plaintiff that the trailer was only going as far as the company's barn situate on Alapai street, and requested plaintiff to get into the motor car. This plaintiff declined to do for the reason that every seat in the motor car was filled and notified the conductor that his destination was some distance beyond

Alapai street. Thereupon the conductor of the trailer took plaintiff's fare. At Alapai street the trailer was detached from the motor car, and plaintiff was again requested to ride to his destination in the motor car, which he again refused to do unless furnished with a seat in the motor car, the seats in the motor car still being all occupied. One or two other passengers were also on the trailer with plaintiff on the ride from Alakea to Alapai streets. On the failure of plaintiff to transfer at Alapai street as requested, the motor car proceeded easterly along King street, and the plaintiff proceeded to his destination on foot. The same thing happened on two occasions during January, 1904. Plaintiff thereupon brought an action in the district court of Honolulu against defendant company for an alleged violation of its contract with him in each instance. Defendant's plea was the general issue. The district magistrate gave judgment for defendant and plaintiff appealed to this court on the point of law that upon the pleadings, admissions and proofs it was error to render judgment for defendant and that judgment should have been rendered in favor of plaintiff.

The material facts were undisputed, and it thus became a question of law whether judgment should have been given for plaintiff or defendant. Defendant's general manager testified that by a general regulation of defendant company that trailer car at the junction of Alapai and King streets was to be detached from the motor car and sent to the company's barn at that time irrespective of the then amount of traffic or number of passengers in the motor car or in the trailer, and that the persons in charge of the trailer and motor car had no discretion in the matter, and also that no harm would have resulted if the trailer had been sent further along King street toward Waikiki. He further testified that on that particular trailer while going easterly no fares should have been collected.

The question at issue in this case is not, whether the defendant company had a right to decline to receive plaintiff as a

passenger on the trailer on the occasions mentioned, nor whether it was then or at all times bound to furnish plaintiff with a seat on one of its cars proceeding from Alakea street easterly toward plaintiff's destination, but it is this, after defendant company had received plaintiff as a passenger and taken his fare and provided him with a seat in the trailer as far as Alapai street, could it detach the trailer from the motor car at Alapai street and insist that plaintiff proceed to his destination in the motor car without a seat?

Defendant, under its charter, is obligated "at all times to maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require." Revised Laws, section 841. There is no question but that defendant on the occasions referred to had the facilities and cars to transport plaintiff to his destination. Defendant has the right to make "reasonable and just regulations with the consent and approval of the governor regarding the maintenance and operation of said railway," (Revised Laws, section 843), although it can hardly be claimed that the withdrawal of the trailer at the point in question was made in compliance with any such reasonable and just regulation.

Even if plaintiff had no right to travel in the trailer, which is not decided, he did and was allowed to do so, and for traveling therein defendant collected the usual fare from him. If one steps upon the platform of a car and announces his intention not to pay but is allowed to enter and sit down like the other passengers and the fare is afterward demanded of him in the usual manner, he is entitled to be treated as a passenger. *Sanford v. Eighth Avenue Railway Co.*, 23 N. Y. 343. It is clear that plaintiff on the occasions mentioned was a passenger and consequently became entitled to a passenger's legal rights. The case of *Chicago & Erie Railway Co. v. Field*, 7 Ind. App. 172, cited by defendant to the effect that acceptance of fare from one did not necessarily bind the company, is not in point, for the reason that in that case the person complaining was held not to be a passenger.

If there were no available seats either in the motor car or in the trailer, and plaintiff still preferred to travel even if he had to stand up, that might have been a different matter, but in this case there were available seats in the trailer and defendant did allow plaintiff to travel as a passenger in the trailer and collected fare from him and furnished him with a seat in the trailer. Having done this, it then became incumbent on defendant, if it wished to detach the trailer before plaintiff's destination was reached, to furnish him for the balance of the ride with as good accommodations as he had had on the trailer. It being within defendant's power, and it having refused, so to do, we hold that defendant company infringed plaintiff's rights and that it violated its contract with plaintiff in each instance, and consequently plaintiff is entitled to recover in the action.

It is unnecessary to decide whether the rule, with reference to steam railroads, that a passenger is entitled to a seat as a matter of right, is applicable to this street railroad company.

The judgment appealed from is reversed and set aside and the case is remanded to the district magistrate of Honolulu with directions to enter up judgment for plaintiff and for such further proceedings as may be proper not inconsistent with this opinion.

Plaintiff in person.

Castle & Withington for defendant.

IN RE ASSESSMENT OF TAXES OF H. HACKFELD & COMPANY, LIMITED, APPEAL BY THE ASSESSOR FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

IN RE ASSESSMENT OF TAXES OF C. BREWER & COMPANY, LIMITED, APPEAL BY THE ASSESSOR FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

IN RE ASSESSMENT OF TAXES OF CASTLE & COOKE, LIMITED, APPEAL BY THE ASSESSOR FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

IN RE ASSESSMENT OF TAXES OF W. G. IRWIN & COMPANY, LIMITED, APPEAL BY THE ASSESSOR FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

IN RE ASSESSMENT OF TAXES OF ALEXANDER & BALDWIN, LIMITED, APPEAL BY THE ASSESSOR FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

IN RE ASSESSMENT OF TAXES OF THEO. H. DAVIES & COMPANY, LIMITED, APPEAL BY THE ASSESSOR FROM TAX APPEAL COURT, FIRST TAXATION DIVISION.

IN RE ASSESSMENT OF TAXES OF F. A. SCHAEFER
& COMPANY, APPEAL BY THE ASSESSOR FROM
TAX APPEAL COURT, FIRST TAXATION DIVI-
SION.

ARGUED MARCH 15, 1905.

DECIDED MARCH 30, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT
IN PLACE OF WILDER, J.

TAXES—plantation agency contracts.

Plantation agency contracts, as held in *C. Brewer & Company's* case, 15, Haw. 36, are taxable by statute. They also have cash values which can be appraised after ascertaining the plantations' condition and prospects and considering probable cost of production and price of sugar, being a similar estimate to that which a purchaser of sugar stocks makes in determining what he will pay for them.

STATEMENT OF THE CASES.

These are appeals by the tax assessor from the tax appeal court involving the assessor's valuation of plantation agency contracts. Some of the contracts are written, having definite terms, others are oral without definite date for termination. The tax appeal court held that although under the decision in *Assessor v. C. Brewer & Co.*, 15 Haw. 36, the contracts are taxable within the meaning of the statute, they have under that decision no cash value when terminable at will or having a term of not more than one year. The court in its decision declared that it could find in the evidence or the law no basis for determining a cash value of any of the contracts; that the evidence showed that "the agents holding contracts with the sugar companies, invariably either themselves, or with their employees or officers, or friends, hold a majority control of the stock of the sugar company, and the contracts are unquestionably of value to the agents holding them;" but "have never been bought or sold in this market, therefore no previous sales of contracts can be used for establishing values;" that

although Brewer & Company returned certain contracts at a valuation, other agencies assigned no cash value to them; that "the return of one contract, and particularly where such contract was coupled with control of plantation stock, could not serve to fix the value of the naked contract stripped of control of stock and incidental advantage in case of some other agency;" that "those contracts containing provisions such that they can be terminated by a year's notice, from either party, are to a large degree perpetual contracts, for those interested are officers, directors and stockholders in both companies to the agreement, and therefore so interwoven with one another that it would be almost impossible to dispose of the contract alone, without a transfer of the control of the stock;" that "it is difficult to imagine one of these agency contracts standing by itself, where the agency holding the contract has no direct interest in the plantation, nor have any of the agent's own stockholders or friends any direct interest in said plantation, in which case the control of the plantation would be in the hands of rivals of, or opponents to, the agent holding the contract;" or that "an agency contract under conditions above outlined has much of a market value, if any."

The assessor valued the contracts by taking the plantation estimate of their crops for 1904, deducting twenty per cent. for unforeseen contingencies, reckoning the proceeds at \$70 a ton and the agents' commissions at 1 1-2 per cent. on sales. From these receipts he deducted fifty per cent. for estimated expenses in connection with the contract and then assessed each contract at four times such net commissions, regarding all the contracts as four year contracts, all of the agents but Castle & Cooke having refused to allow him to see their contracts or to give any information about them.

A. G. M. Robertson for the assessor: "There is practically but one question to be decided, and that is, the full cash value of each contract. That each one of these contracts is a contract within the meaning of the tax law and subject to be taxed at its full cash value was held in 15 Haw. 29, 36, where it is

said 'these agreements whether written or verbal and whether for a definite period or terminable at will are certainly all 'contracts' within the meaning of section 819. The court did go on to say that 'those terminable at will as also that with the Ookala Sugar Company for a term of one year only, have of themselves no cash value—nothing could be realized upon an attempted sale of a privilege to act as agent, which privilege carried with it no assurance of its continuance for a definite length of time.' The point that the supreme court passed on, and all that it could pass on, was whether as shown by the evidence in that case, those particular contracts had any cash value, and if so what it was. The cash value of a piece of property is a question of fact and not a question of law. If it appears from the evidence in these cases at bar that contracts similar in terms to those in the *Brewer* case have a cash value, then it is the clear duty of this court to ascertain that value. The record in these cases shows that what might be called terminable at will contracts have, perhaps not in theory, but certainly in practice, as much value as contracts for definite terms, and that any evidence tending to show a cash value of any one kind of a contract shows a cash value of any other kind. Every contract has been definitely assessed a certain amount. The evidence shows in the case of each contract what was the actual income derived therefrom, and what were the expenses in connection therewith. The length of the unexpired term of each contract has been shown. * * * Other facts have also been shown in the case of each contract, namely, the amount of sugar produced in the past by the plantation and the probability and the uncertainty as to the amount to be produced hereafter, the cost of production, past and future, the amount of the advances requisite, the obligation to make those advances when needed and to procure the money for that purpose, and the continued credit of the agents at home and abroad. These are all elements suggested by the court in the *Brewer* case, 15 Haw. 37, that should be considered. And from all these facts there should be no difficulty in ascertaining with definiteness the

value of any particular contract. We strongly contend that justice will not be accomplished by regarding these contracts as of no value. That these contracts have value is shown by the opinions of the tax-payers themselves. Irwin, one of the most candid of the witnesses, stated in substance that the Paauhau contract had no cash value because it was not transferable and was not classed as an asset. Then he was asked the following question: 'Assuming that this were an assignable contract, what would you consider the value of such a contract if it were assignable?' to which he replied: 'I suppose the amount set forth in that table is a fair value, showing in the neighborhood of \$5,000, and expenses fifty per cent., \$2,500 a year.' * *

* Bowen, of Castle & Cooke, Ltd., referring to the Ewa contract which is held by it, said: 'We desire to retain the contract for the business furnished,' and that such a contract was valuable to them. Bishop, of C. Brewer & Co., testified that the agency business was valuable. In addition to this Hackfeld & Co. return a value of some of their contracts and Brewer & Co. of some of theirs.

"Attention is called to the fact that in no case is less than 1 1-2 per cent. charged for commissions, and sometimes it is as high as four per cent. In no case has the assessor allowed for any commissions for purchases outside of the Territory, although in every case there has been some charged. In no case has the assessor allowed for any of the indirect benefits derived from the contracts, which undoubtedly increase the value, such as profit from sales of merchandise to the plantation by the agent, placing insurance of plantation property in companies contributing to the agent, receiving the benefit of exchange, getting a rake-off from steamship lines carrying the sugars from the Territory to the mainland, etc. A striking example of what these indirect benefits are is found in the case of the Oahu Sugar Co. contract held by Hackfeld & Co. In that case the plantation keeps a plantation store at Wai-pahu. This store is stocked up mainly with goods from Hackfeld & Co. merchandise department, and the profits from such sales from Hackfeld & Co. merchandise department, which gets the privilege in practice, if not in theory, of being first to sell by reason of the contract held by the Hackfeld & Co. agency

department, goes into what may be called Hackfeld & Co. profit department.'

Taking up the contracts of each tax-payer, Alexander & Baldwin, Ltd., have six contracts returned at nothing and assessed at \$111,831.32. All its contracts except Kihei are for one year from May 1, 1903, and thereafter until one year from date of receipt of notice of termination by either party. The agent receives two per cent. on gross sales of sugar and 2 1-2 per cent. on purchases of merchandise outside of the Territory; six per cent. interest on advances and pays interest on credit balances at only three per cent.; and also receives shipping commissions. Its Kihei contract is for fifteen years from October 31, 1899. Tonnage, 1,374 tons in 1901, and 5,629 in 1903. "It is admitted that the agent received out of these contracts during 1903 the sum of \$27,957.83. It would not be far wrong to say that directly and indirectly the agent received during 1903 by virtue of these contracts over \$75,000."

Castle & Cooke, Ltd., has five contracts returned at nothing and assessed at \$97,662.60. Two of its contracts, Ewa and Waialua, are for fifteen years from October 1, 1898, the agent receiving 1 1-2 per cent. net on sugar sales and commissions on purchases elsewhere, also benefit of exchange. The plantations get no interest on credit balances. Its contract with Apokaa, a small plantation, calls for 1 1-2 per cent. commissions on gross sales; the contracts with Kohala Sugar Co. and Waimea, 2 1-2 per cent. "In referring to these Castle & Cooke contracts it appeared that during 1903 it made \$43,113.78 in addition to actual commissions on sugar sales. This just shows how valuable these contracts are. Take away the contracts and you not only take away the actual commissions received by them, but also this extra amount of over \$40,000 which is received by virtue of the contracts. The assessment against Castle & Cooke is clearly justifiable."

Hackfeld & Co., Ltd., has nine contracts, "four of which were apparently returned at \$40,445.52, and all of which were

assessed at \$110,615.40. The tax-payer took the four written contracts it has and figured the net yearly profit for 1903 on them which amounted to the return. If that was the proper method of finding the value then the other five should have been valued in the same manner. But clearly a contract which has, say, ten years to run, certainly has a cash value of more than one year's net profit from the same." Its contracts with Oahu Sugar Co., Pioneer Mill, Kekaha and Koloa are respectively for twelve years from April 1, 1897, fifteen years from October 1, 1898, fifteen years from October 1, 1899 and fifteen years from January 1, 1902, allowing 1 1-2 per cent. net on sugar sales, benefit of exchange and exclusive right to purchases or procuring of machinery and supplies for the plantation, free of commissions, but allowing the agent the profits made in such purchases and sales. Its remaining contracts, namely, Lihue, Kukaiau, Hawaii Mill, Kipahulu and Grove Farm, although from year to year, have been running along for about twenty years, except Hawaii Mill, five years.

W. G. Irwin & Co., Ltd., has eight contracts, two in writing, the others oral. Its Paauhau and Kilauea are for ten years from March 2, 1899. Its Hakalau, Hilo Sugar Co., Hutchinson Sugar Co., Honolulu Plantation, Olowalu and Waimanalo contracts have been running for many years, all these plantations showing large net profits in 1903. This is true of every one of the agency contracts of all of the taxpayers in the present cases.

C. Brewer & Co., Ltd., has five contracts, one in writing; Onomea for twelve years from July 1, 1899, which was returned for \$8,308.40. All of these contracts were assessed at \$65,463.32. Its Onomea and Ookala contracts require 2 1-2 per cent. commissions. Its remaining contracts with Wailuku, Honomu, Hawaiian Agricultural Co. show substantial profits.

T. H. Davies & Co., Ltd., has eight contracts assessed at \$56,895.32. Its return was made of \$120 without explanation. Its McBryde contract is for fifteen years from 1899. The agent received in 1903 \$16,000 commissions from sugar

sales and about \$1,000 from purchases. "The other plantations for which Davies are agents, namely, Laupahoehoe, Pepekeo, Waiakea, Union Mill, Niulii, Hamakua Mill and Pua-kea, have no written contracts with their agents, except Pua-kea, which is a very small plantation and from which the agent received in 1903 the sum of \$610 in commissions. There is not much information in the record about these plantations due to the fact that the tax-payer failed to furnish it. All of these contracts are valuable ones. The assessor figured on all of the contracts of this tax-payer that the agent received a net profit in 1903 of \$14,223.83. What the tax-payer actually receives is more probably in the neighborhood of four or five times as much. Property returning such an annual profit has value, and any one with common sense cannot deny it."

F. A. Schaefer & Co. have two contracts returned at nothing and assessed at \$18,127.20, Honokaa and Pacific Sugar Mill each for fifteen years from July 1, 1899. "A good deal has been said about the necessity of maintaining credit by the agent. The matter is very simple. Any bank will advance money on the bills of lading for sugar shipped, and all the sugar has to come to the agent. It is a queer thing, but it rarely if ever happens that a plantation has a credit balance. It seems to be the policy of the agents to always keep the plantations in debt. It is almost criminal the way some of the agency business is conducted. The idea of advancing money to pay dividends and charging the plantation all the way from six per cent. to ten per cent. for the advances and then in addition practically compounding this rate. Then, too, think of an agent making out of his dealings for his principal a profit in addition to the stipulated compensation. There is undoubtedly a day of reckoning ahead for the agents."

Castle & Withington for Castle & Cooke, Limited: "The meaning of the word 'contracts' must be interpreted in the light of the analogous classes of personal property set forth in the section. The maxim '*noscitur a sociis*' applies, and it includes only contracts which are of the nature of chattel

interests in land and real property, of franchises, of a right to growing crops, and of public stocks and bonds. * * * A recent case held that the word 'contract' should be construed strictly and did not include promissory notes or bills of exchange, checks or accounts receivable. (*Assessor v. Brewer & Co.*, 15 Haw. 29.) It is true this case treats 'agency contracts' as if assessable but this point is clearly dictum and not considered by the court, as the 'agency contracts' were not assessed. * * * The proposed construction would exempt from taxation all those contracts which come within the ordinary purview of the word and leave a contract of a kind which has never been included by legislative or judicial construction within the meaning of the term as applied in tax statutes. * * * To impose taxes on agency contracts and not upon other contracts is in violation of the Fourteenth Amendment. * * * The act should not be construed to include these agency contracts for numerous reasons, chief of which is that no method of valuing them has been provided by the legislature and as was decided in the *Brewer* case they are incapable of a definite valuation. 'Whether a specific right is subject to taxation may depend upon whether it is capable of valuation bearing a definite relation to other things and property or whether the legislature has provided a method for its valuation.' Am. and Eng. Ency. Law, vol. 27, p. 635."

Paid up life insurance policies are not taxable because "the statute must not only provide what property must be taxed, but it must provide methods for the valuation of such property." *State Board v. Holliday*, 150 Ind. 216. A contract of membership in the associated press cannot be taxed as a credit, the court saying: "Can it be contended for a moment that such contract for the personal services of an editor would be subject to taxation? If so, by whom and how could the value of the contract be fixed or determined? If such a contract were taxable, the same rule would embrace all contracts for labor." *Commrs. v. Rocky Mt. News Print. Co.*, 61 Pac. 494. A contract for the purchase of land does not create a debt and is

not "an effect having marketable value." *Perrigo v. Milwaukee*, 92 Wis. 235. The right to a legacy is not taxable. *Chisholm v. Shields*, 67 Ohio 374. A seat in a stock exchange is not taxable, having no marketable value and the statute not previously having been construed as requiring its taxation. *Baltimore v. Johnson*, 96 Md. 737. So 167 N. Y. 1; 103 Cal. 69.

In the case of this tax-payer the evidence is conclusive that there is no way of fixing a market value. There are no such contracts which are assignable that would fix the market value of these contracts if they were assignable. Some agencies have returned this value as the profits for one year, but this contention is untenable if the contracts in themselves have no value. A contract for years is worth more than a contract for one year. Taxing one year's profit is merely increasing the income tax and that upon the gross income. The assessor's plan to "take a gross income arbitrarily, charge up fifty per cent. as expenses and then estimate the value of the contract as four times the net result is obnoxious to every rule of taxation. The value of these contracts would not be arrived at in this way. Their value for taxation is, as the court has already held in numerous cases, not the value to the agents but their market value, what they would sell for on the market, what someone else would give for them. There is not evidence in these cases that they have any market value, that anyone would give anything for them apart from the personal good will and trust and confidence which are inextricably woven into the contracts; in other words, what is paid for here in the commission is the personal services of the agents thereof, their high credit, their wide knowledge of plantation conditions and of the marketing conditions, their ability to successfully organize, manage and finance the companies. * * * It would be eminently unjust to charge up to Castle & Cooke, Ltd., as an asset the value of Mr. Tenney and Mr. Bowen as officers of the Ewa Plantation Company. There would be no way of estimating the value, and the value is a personal value which

does not come within the purview of taxation. To tax these contracts on the law, as it stands now, without any provision for valuing them, would lead to an endless complication and endless difficulties."

An oil lease paying one-eighth of the oil as a royalty cannot be taxed as personal property. *Carter v. Tyler*, 45 Va. 806. So a turpentine lease giving the right to take crude turpentine from trees is not an interest in land. *Ashe Co. v. State*, 35 So. 38.

Castle & Cooke, Ltd., has made a full disclosure which shows that its commissions are the lowest charged, 1 1-2 per cent. on the gross or 2 1-2 per cent on the net. It is admitted that in most cases there was fifty per cent. profit, but they show an average profit during the life of these contracts of \$7,276.47. "Of course no one would take the contracts at any price if they were not profitable and some profit would be demanded; certainly, the amount shown is very small."

The net profit made "does not take into consideration what it is worth to pledge the credit of Castle & Cooke, Ltd., and to pledge its more than \$2,250,000 of assets to raise money to finance these agencies, nor does it take into consideration what would be a fair margin of profit on agency contracts.

* * * The contracts of Castle & Cooke, Ltd., are more advantageous to the plantations. There is no limit on the amounts to be advanced; there are no provisions authorizing the furnishing of plantation supplies nor is the plantation restricted by the contract to purchasing from its agents. So far as Castle & Cooke, Ltd., are concerned, the only right which they acquire which is assured is the right to the commission on sugar. It is incredible that if these contracts had any market value they would not have been estimated by the parties at some value and as an asset. Castle & Cooke, Ltd., so the evidence shows, have counted them as of no value. We think this worthy of serious consideration because it was not done with a view of escaping taxation but was an honest estimate put by the parties on the contracts when an attempt to tax

them was not anticipated. If these contracts are taxable then they are taxable on the ground that they are too favorable to the agents and not favorable enough to the plantation; in other words, that the agents have something from the plantation for which they give no return. There is no evidence in this case that the contracts are not made for a fair consideration, and we submit further in the case of Castle & Cooke, Ltd., that where that consideration is the lowest any contract is made for the presumption is irrefutable that there is no value in the contract which is taxable."

Smith & Lewis for Alexander & Baldwin, Limited: This tax-payer has five agency contracts, namely, Hawaiian Commercial & Sugar Co., Hawaiian Sugar Co., Kahuku Plantation Co., for one year each, Maui Agricultural Co. for two years, Kihei Plantation Co., Ltd., for ten years; except the last all being terminable on a year's notice, making them one year contracts. The *Brewer case*, 15 Haw. 29, decided that such contracts "have of themselves no cash value. Nothing could be realized upon an attempted sale of a privilege to act as agent, which privilege carried with it no assurance of its continuance for a definite length of time." The same ruling applies to the agency contract of the Maui Agricultural Company, since from January 1, 1905, it is terminable on one year's notice, making it "a two years' contract for the year and thereafter a one year's contract. The Maui Agricultural Company is a partnership including besides the Haiku Sugar Co. and Paia Plantation five corporations, each owning one thousand acres of land, and which on January 1, 1904, "had not a stalk of cane on their lands, the plow share had never touched the soil. The company giving the contract is an enterprise which is in the nature of an experiment. The testimony shows that a sum of about \$500,000 will necessarily be spent in 1904 to place the company in position to operate. The term of the contract being no longer than two years we urge that the value for taxation purposes is nil."

"As to the Kihei contract the testimony shows that although

the contract is for a period of ten years, the great expense in running the plantation, the trials and experiences of the past, and the heavy overdrafts by the plantation induced the witness on the stand to testify that the agents would have been very pleased on the first of January to turn the agency contracts over to any one who would pay them, the agents, the money they had advanced the plantation."

The tax-payer's exhibit filed herein shows the balances owing after allowing all credits "what value, if any, this contract has. During the year 1902 for the first three months the debit balance showed from \$388,742.48 to \$453,128.21. The average debit balance for the year 1902 was \$228,918.41. For the year 1903 the average debit balance was \$176,059.70. At no time did the plantation show a credit balance with its agents. The evidence also showed that the cost of production of sugar on the plantation for the year 1901 was \$233.84; for 1902 \$66.67 and for 1903 \$81.20. With such a showing although the contract runs for a definite term of ten years, it would seem as though for the amount of money involved, the risk, and the high cost of production, that the contract had no value for taxation purposes."

The incidental advantages going with these contracts cannot be considered as an element of their value, the full cash value being the "value for purposes of sale, if the property is salable, and not the value to the owner," or if the contract is non-assignable "the test would be what it would be worth if it were assignable. 'If the contracts under consideration have any value by reason of the ownership by the same company of large portions of the capital stock of the corporation with which the contracts are made, then such value is not taxable to the company because growing out of and due to the ownership of property which, as above seen, cannot be taxed to the company.' 15 Haw. 36-7." Also 15 Haw. 479.

The test laid down by the above cases is "what would the Kihei agency contract sell for in the open market on the first day of January, 1904, and not what it would be worth to the owner." These contracts are not carried on the tax-payer's

books as of any value. They are contracts for services in which the agent earns his commissions for the work done.

Kinney, McClanahan & Cooper for C. Brewer & Company, Ltd., H. Hackfeld & Company, Ltd., W. G. Irwin & Company, Ltd., T. H. Davies & Company, Ltd., and F. A. Schaefer & Company: These tax-payers make the same contention with the others, relying especially upon the *Brewer* case, ante, although claiming that the decision was that such contracts are within the statute but have no cash value, thus disposing of all contracts having not more than a year to run. Contracts for more than one year have no salable value, and in any event the value is no greater than the contract's net earning capacity for one year. "The value of the contracts depends largely, if not entirely, upon the agents' control of the corporation's stock and hence is not taxable." The argument for the assessor ignores "the main essential fact that the value of the contracts depends largely on the agent's control of the stock of the plantation."

"The assessor proceeds by allowing fifty per cent. of the gross earning capacity of the contract as expenses actually incurred. He then says he will be liberal and fix a value on the contract equal to a sum which would realize twenty-five per cent. as a matter of investment; he finds that the net earning capacity of the contract is \$500, the necessary sum which, if invested at twenty-five per cent. to produce \$500 would be \$2,000, which he fixes as the basis of the value of the contract for taxation purposes. We point out the fallacy of the assessor's methods as follows:

"The contract being intangible in its nature has no value except its earning capacity, and cannot be placed in the same category as real and personal property which have an intrinsic value, which is fixed either by its use to the owner or its earning capacity.

"Our contract is good for four years. Its total net earning capacity for those years is \$2,000, and granted for the moment that a man would pay in the market (setting aside the question of interest on investment) \$2,000 for such a contract, does that make him liable for a tax upon such contract at the rate of \$2,000 for each of the four years, or a total tax payment

of \$80? The response to this may be that there would be a diminishing value in the contract as each year goes by. This looks plausible but it is not sound if the assessor has been correct in his first stand in fixing the value of the contract *as property*. Taxes are not assessed and collected for the future, but the method adopted by the assessor in these cases is an assessment of the contract on the basis that the value of the contract for the entire term is consolidated and made liable for the tax of the present year. In other words, the future has been discounted. * * * The contract makes a net earning of \$500 for the first year and is valued accordingly, and a tax of \$5 is paid, and so through the succeeding years until the contract expires, at which time it has no further value. In this way the total tax collected has been \$20 or one per cent. upon the valuation of \$2,000 which is the maximum value that could be claimed for the contract. Under the process suggested by the assessor, the tax-payer would pay one per cent. upon the full value of the contract for the current year, and a further tax each succeeding year, which would be a direct and absolute violation of the law for the collection of taxes. This same rule would apply to contracts having a longer term than four years. *The government is not entitled to collect any greater sum than one per cent. upon the total value of the contract for its entire term, such sum to be equally distributed through the years comprising said term.*

"What we claim is, that these contracts to have a value for taxation purposes must have a definite unexpired term of more than one year, and that the value in such case, if anything, is the earning capacity of such contract for each year of the term less the expense incurred in maintaining the same, and the worth of the personal service rendered by the agent under the contract."

Take a building contract, for instance, "no man would bid for such a contract more than the net value after deducting cost of labor and materials, and a reasonable percentage for his time and skill, so with the agency contract there should be an allowance for the personal skill, credit and service of the agent."

"The income producing capacity of the contract cannot be fixed by mere conjecture or presumption." The uncertainty of crops and sugar prices and the necessity to maintain credit

abroad are to be considered. Tangible property earns a certain amount each year, its owner having both the earnings and the property, "but intangible property such as an agency contract has only its earning capacity and nothing more." An agency contract can only be assessed once at its value.

In Irwin's contracts it is admitted that the gross commissions received are correctly stated by the assessor, and that fifty per cent. for expenses was correctly estimated by him. Their contracts are all at will, except two, with unexpired terms of about five years each. Irwin testified that \$2,500 was a fair value for the Paauhau contract. On the same basis the Kilauea contract would be worth about \$1,450. Brewers have no contracts except with Onomea, from which they had \$17,882.48 commissions, the value of which contract they returned at \$8,308.48. Hackfeld had contracts only with Oahu Sugar, Pioneer, Kekaha and Koloa. The return of their value made by it of \$40,445.52 was liberal. There is no other evidence upon this subject before the court in those cases. Davies had no contracts except with McBryde and Puakea. The former has no value, for the contract if sold would carry an obligation of advancing \$990,000. No purchaser could be found for it. It has no market value. Puakea receipts were \$610 and the contract has no commercial value. The agency of all the other plantations is terminable at will, resulting from majority ownership. Schaefer had contracts with Honokaa and Pacific Mill only; no value to them, owing to the great risk in conducting their business.

OPINION OF THE COURT BY HARTWELL, J.

Are the agency contracts taxable? The statute includes contracts in its classification of taxable things. In order to hold that these contracts are not taxable a distinction based upon some principle must be made between taxable and non-taxable contracts. It is not enough to exempt a contract from taxation that it is intangible, for that is the nature of all contracts; nor that the contract is secured by reason of influential

relations; or in consideration of reliance placed in the ability, experience and good judgment and the difficult nature of the service of those to whom the contract is awarded. Such considerations may always exist, and it is not too much to say that except in cases of sinecures they always ought to be the basis of contracts. The uncertainty or length of time of the contract may affect its value, but it would be illogical that one who has the benefit of a contract for five years shall be taxed therefor and that the holder of a contract for one year shall not be taxed. It is true that ownership of a majority of the stock of an incorporated sugar plantation carries with it the power to secure contracts for the agency of the plantation, but this is not an incident of ownership of the stock in the same sense that receipt of dividends is a proprietary right. If the majority shareholders were to appoint, as they might do, an agent other than themselves and give him the contract, there would be no stronger or other reason for taxing such person for the value of his contract than when they give the contract to themselves rather than a third person. Moreover, if it were true that obtaining an agency contract is an incident of owning a majority of the stock, that does not detract from the value or taxability of the contract any more than from the money received from dividends as a result of owning stock. But it is claimed that the contracts require in some instances heavy advances of money to be made by the agents, who undertake **great risks** thereby, resulting, perhaps, in large losses and that at any time large loss may result from such causes as fall in prices, shortage of labor or failure of the crop. But it is to be presumed as a rule that the security for advances is sufficient, or the risk would not have been taken.

Castle & Cooke show that their agency profits generally for their various plantations netted them an average annual profit of \$7,276.47, owing to unfortunate conditions in respect of certain plantations. This would be a reason for a lower valuation of the contract for such plantations, but would not justify

the conclusion that the agencies of other plantations were of less value than their results showed.

It is said that the contracts are of value solely to those who hold them and have no salable or market value because the holders either do not wish to sell or have no right to do so; but it is seldom that contracts are assignable like negotiable paper. Their non-assignability does not exempt them from taxation.

Further it is claimed that the test value for taxation purposes is not the value to the owners, but the market value. This is sometimes true, as for instance, the owner of an heirloom may attach value to it entirely apart from its intrinsic value and which would be utterly inappropriate as a basis for assessing taxes; but it cannot be said of things having an actual, real and estimable value to their owners, which is a value *per se* and intrinsic, that they have no market value.

Contracts which secure to their holders many thousands of dollars in a year as agents of sugar plantations have actual, intrinsic value, which cannot be eliminated because the holders of the contracts will not or cannot part with them, or have obtained them in consequence of personal or business relations, or of ownership of a controlling interest in the plantations, or because in return for such compensation they give an equivalent service.

The statute in mentioning contracts as taxable makes no exception of agency contracts obtained as these are obtained, but applies in every such instance. In the *Brewer* case, 15 Haw. 29, it was held that contracts for the agency of the Onomea and Ookala Sugar Companies were within the meaning of the statute, but that on the evidence adduced in that case no valuation could be attached to them. Upon the evidence adduced in these cases we cannot say that value cannot be attached to them. To say that they are valueless requires one to lay aside conceptions of value in its ordinary and usually understood meaning. One could as easily estimate the value of a contract as the value of stock. It is true that there are many

things of great pecuniary value which are incapable of definite valuation for purposes of taxation or for any other purpose, as for instance, influence, power, opportunity, experience, integrity, tactfulness, good judgment, acquaintance, the value of which is inestimable, and none of which *per se* would be taxable. It would be grotesque to speak of the possessor of such qualities or qualifications as taxable for them; but a contract obtained by reason thereof, or as a consequence and by the exercise of such desirable and advantageous qualities or opportunities is none the less therefor a taxable contract.

What then is the value of these contracts? Is it not what their holders get out of them less what they expend in executing them? All contracts are in the absence of evidence to the contrary presumed to be based on a sufficient and legal consideration, a *quid pro quo*. The plantations obtain from their agents the benefit of their services, their best judgment, their attention to the affairs entrusted to their charge, and it is to be presumed that for these benefits full, adequate compensation is made. Surely the contracts are not valueless because the agents earn and deserve all they receive for performing them. This does not mean that one may not make a contract by which he has bound himself to do things which entail not gain to himself but loss. The contracts in question are not of that kind. On the contrary they bring and are meant to bring definite important and direct pecuniary gains to the agents who hold them. They are assets of great value, so recognized by all persons familiar with the business houses who hold them. These values are very tangible things, and the way it comes to pass that the contracts are obtained is immaterial.

It is claimed that on the rule *noscitur a sociis* the contracts meant by the tax law must be construed to mean something like the other things therein named, as for instance, chattel interests; but the word "contracts" was introduced in 1886 into the earlier statute and evidently was meant to include something different from and in addition to the things previously enumerated.

As to the claim made by one of the tax-payers that the Fourteenth Amendment requiring equal protection of the laws does not permit the taxation of the contracts in question, and also that their taxation would amount to double taxation, namely, one under the income tax law and the other under the law treating the contracts as a species of property, "double or duplicate taxation may be enforced by a state or may result from the operation of the tax laws of a state without violating the constitutional guaranty of due process of law. It has been repeatedly recognized that duplicate taxation, to a certain extent, cannot be avoided in state tax systems. Thus may be taxed both property and the money that is paid for the property; land and the mortgage upon the land; property and the income from the property. * * * Assuming that there is no discrimination as between the tax-payer in the same class, the power of the state to tax twice is said to be the same as the power to tax once, that is, no constitutional question is raised by the exercise of that power." Judson on Taxation, Sec. 426.

"It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this." Per Miller, J., in *Davidson v. New Orleans*, 96 U. S. 106.

"It is not every indirect duplication of a tax which constitutes double taxation. If the duplication be only an incident of the tax it is not double taxation in the sense of the requirement that equality and uniformity must be preserved." 1 Cooley on Taxation, 3d Ed., 389, note 1, citing *S. Nashville St. R. Co. v. Morrow*, 3 Pickle 406.

Another objection made to taxing the contracts is the uncertainty of their duration, making it impossible, as it is claimed, to attach value to them in any case not for more than one year. There appears to be practically a certainty of renewal of these contracts from year to year, but the correct method of valuing yearly contracts is to take their cash value for one year only. The cash value of such contracts, as well as of longer term contracts, could easily be appraised by persons qualified to hold

them, after ascertainment of the conditions and prospects of the plantation and a consideration of the probable cost of production and price of sugar. This is the estimate that every purchaser of sugar stocks makes in determining what he will pay for them.

Upon the whole we think that while for various reasons it may not be true that every species and form of contract is taxable, these contracts have such a distinctive, established and valuable nature that they cannot be eliminated from the statute, and that their reasonably approximate cash value may be ascertained. Various methods of ascertaining a cash value for time contracts would be appropriate. One method would be to ascertain the present worth of the yearly profit for a term of years, which of course, would decrease in amount with a lapse of each year of such term, and to make allowances for any special features that might exist. By applying such method of valuation, omitting from the calculation all incidental profits, considering solely those arising from commissions on sales, we consider that the assessor's valuation was not too high in respect of H. Hackfeld & Co., Ltd., (\$110,615.40); of Castle & Cooke, Ltd., (\$97,662.60); and of F. A. Schaefer & Co., (\$18,127.20). In those instances the method of valuing by obtaining the present worth of estimated annual profits for a term of years would bring the assessor's valuations well within results so reached, and we sustain those valuations. For various considerations presented in the cases, for instance, in respect of the McBryde contract of Theo. H. Davies & Co., Ltd., to which we attach no value, we reduce the assessor's valuations as follows: C. Brewer & Co., Ltd., to \$40,000; W. G. Irwin & Co., Ltd., to \$40,000; Alexander & Baldwin, Ltd., to \$35,000; Theo. H. Davies & Co., Ltd., to \$15,000.

The decisions of the tax appeal court are reversed and the assessor's valuations are sustained in the instances above mentioned and are reduced as above stated.

INTER-ISLAND TELEGRAPH COMPANY, LIMITED,
HENRY WATERHOUSE TRUST COMPANY, LIMITED,
NELLIE D. CROSS v. LILIUOKALANI, A. M.
BROWN, HIGH SHERIFF OF THE TERRITORY
OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

SUBMITTED FEBRUARY 21, 1904. DECIDED APRIL 6, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE ROBINSON
IN PLACE OF WILDER, J.

WIRELESS TELEGRAPH COMPANY—*property not exempt from execution for debt—Act 75, Laws of 1903, imposes on that company no obligation to perform public service.*

The property of the Inter-Island Telegraph Company is not exempt from execution on a judgment against it for debt by reason of its being a quasi public corporation under obligation to perform service for the public, or by reason of anything contained in Act 75 of the Laws of 1903 providing a monthly subsidy for the company.

ID., MORTGAGED CHATTELS—*levy of execution on—unnecessary to levy upon the whole.*

A demurrer to a mortgagee's bill for an injunction against a sale on execution of mortgaged chattels is sustained on the ground that if execution may be levied on such chattels the mortgagee has an adequate remedy at law. It is unnecessary that all of the mortgaged property (if any) be sold. If the interests of all concerned, including the mortgagees, would be injuriously affected by unnecessary levy and sale an action for malicious and vexatious use of process would give a remedy.

OPINION OF THE COURT BY HARTWELL, J.

The defendant Liliuokalani, having taken out execution on a judgment, for \$268.75 against the Inter-Island Telegraph Company, Ltd., in an action before the district magistrate of Honolulu, the high sheriff levied on certain instruments used in that company's office in Honolulu and required for operating its system, namely, "a key, sounder and inker." The Telegraph Company thereupon joined with the Waterhouse Trust Co. and Cross, mortgagees of the Telegraph Company's property, in a bill praying for a temporary injunction restraining the defendants from "further interference with the instruments or property of the petitioners, or either of them, employed in the operation of the telegraph system for said Inter-Island Telegraph Company, Ltd., or connected therewith, or necessary or used in connection with the same," and that the defendants "be enjoined permanently from interfering with said instruments or with the operation of the said company or with any of the property of the petitioners, or either of them, used in connection with the operation of said system, or convenient for the same." The defendants demurred to the bill for misjoinder of plaintiffs and want of equity. The circuit judge overruled the demurrer, allowing an appeal to this court. The Telegraph Company bases its claim that its property is exempt from execution for its debts on the grounds that it is engaged in a governmental service, a common carrier, engaged in a service for the public in which the public have an interest, basing this claim mainly upon the provisions of act 75 of the Laws of 1903. The correctness of this claim depends upon one or the other of the following considerations: That this company is a quasi public corporation, the property of which cannot be levied upon because "affected with a public interest or held charged with a trust for public purposes;" (6 Thompson on Corp., Sec. 7797), or because the corporation "is charged with public duties and is in the exercise of its franchises and the performance of such duties," and that the property "is essen-

tial to enable it to discharge its franchises and perform its duties to the public." 3 Clark and Marshall on Corp., p. 2340. This is "on consideration of public policy." Ib. 2341. The doctrine does not apply to property of a purely private corporation "which owes no duties to the public." Ib. 2342, citing 169 Pa. St. 626. "The exemption from levy is maintainable only upon the theory that the corporation is created for the furtherance of public purposes of such importance as is essential to effect these purposes." Ib. 2343, citing 8 Humphreys 103. One test of a quasi public corporation is whether it is under obligation to perform duties, a question often tested in mandamus proceedings. Mandamus to compel such duties will lie where the charter of a corporation or the statute in force "imposes a specific duty either in terms or by a fair and reasonable construction and implication. * * * The writ will not be awarded, unless the right sought to be enforced is a complete and perfect legal right, and, of course, the reciprocal obligation a complete and perfect legal obligation." 6 Thomp., Sec. 7826. "The right and obligation are necessarily correlative; if there be no obligation, there is no right." *State v. So. Minn. R. Co.*, 18 Minn. 21. "In respect of corporations created for public objects, such as railway, turnpike and canal companies, the view is that property belonging to such corporations, which is indispensable to the exercise of the franchises conferred upon them and to the performance of the correlative duties which they have assumed in behalf of the public, is not vendible in execution for the satisfaction of their debts." Thomp., Sec. 7848. "This exemption is founded alone on the consideration that the corporation has public duties to perform, and that it would be disabled from performing them by the deprivation of the property thus exempted." Ib. Sec. 7855, citing *Foster v. Fowler*, 60 Pa. St. 27. The services rendered by the Chicago Gas Co. "is the exercise of a franchise belonging to the state. Services rendered and to be rendered for such grant are of a public nature, and prevents the company by contract

with another company from disabling itself from the performance of its public duty." *Chicago Gas Co. v. People's Gas Co.*, 121 Ill. 530, citing *Louisville Gas Co. v. Citizen's Gas Co.*, 115 U. S. 683. In the latter case the court says in substance that the business is not like that of ordinary corporations engaged in making articles that may be as indispensable as are gas lights, but supplying gas to the public is "a matter of which the public may assume control and for such public service may grant exclusive privileges." "Inasmuch, therefore, as by the terms of its charter the appellant owed a duty to the public, it could not avoid the performance of that duty by a contract with another corporation." *Ib.* 540. Gas, water, electric light, telegraph and telephone and street railway companies "and all similar corporations which have obtained the right to use the public streets for the erection or extension of their works" are bound to "serve the public faithfully and impartially and at reasonable rates, and this is a duty the performance of which may be enforced by the courts." *Gas Light Co. v. United Gas Co.*, 85 Me. 537. A corporation organized to supply heat by circulation of hot water through pipes laid in the public streets and connected with buildings may mortgage its property. The doctrine in favor of railroads "does not apply to ordinary trading or manufacturing corporations," the court distinguishing between such corporations and those which are established for objects quasi public, "such as railway, canal and turnpike corporations to which the right of eminent domain and for which large privileges are granted in order to enable them to accommodate the public." *Evans v. Boston Heating Co.*, 157 Mass. 37. Gas companies are not exempt from taxation as a public corporation on the ground that "no public duty is imposed upon them, nor are they charged with any public trust. They are authorized to make and distribute gas for their own profit and gain only. They are not bound to sell and dispose of it to any one, either for public or private use." *Com. v. Lowell Gas Light Co.*, 1 Allen 75. So of a company

authorized to transact a general storage and elevator business, (*Girard Co. v. Foundry Co.*, 105 Pa. 248), in which the court says of a company devoting its property to a use in which the public has an interest, "But it certainly does not follow that because of this public interest the property of a private person is made public property or even quasi public property, or that it is therefore exempt from ordinary execution process." *Hunt v. Memphis Gas Light Co.*, 31 S. W. Rep. 1006 (Tenn.), held that as the charter of the company does not confer a right of eminent domain or exclusive privilege it can mortgage its property.

The principle to be deduced from the cases, and which rests on right reason, is that it is not sufficient to exempt the property of a corporation from execution for its debts that it receive a government subsidy; or was formed for performing service of a public nature or in which the public, whether directly or indirectly, is interested; or is engaged to perform and is performing service for the government or heads of departments. There should be some duty imposed on the corporation, either by statute or law, or by its engagements, requiring its performance of public service, or some grant of a public franchise authorizing the taking of private property for public use whereby property taken, as well as other property required for use of that which is taken, is stamped with a public trust. The statement in *Morawetz* (Priv. Corp., Sec. 1125), that "if a corporation has received aid from the government for a public trust, any property of the company which is necessary to enable it to accomplish this purpose is impressed with a trust in favor of the public and cannot be seized or sold by creditors of the company under an execution" does not appear to be sustained by the cases cited in its support nor by sound principle. *Cue v. Tide Water Canal Co.*, 24 How. 257, 16 L. E. 635, is cited for that statement, as well as in plaintiff's brief, as a leading case. Cue, the appellant, having furnished work and materials for construction of the tide water canal, recovered judgment

against the company on which execution was issued for sale of the company's property in Maryland. A bill was brought to enjoin the sale. Levy was made on the locks of the canal, its toll house and lands surrounding necessary to the working of the canal. The court, Taney, C. J., after observing that the canal was "a great thoroughfare of trade through which a large portion of the vast region of country bordering on the Susquehanna river usually passes in order to reach tide water and a market," said, "The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it according to the rates granted and prescribed in the act of assembly which created the corporation. The property seized by the marshal is of itself of scarcely any value apart from the franchise of taking toll; * * * but would yet, as it is essential to the working of the canal, render the property of the company in the franchises now so valuable and productive utterly valueless;" further remarking that this franchise, "being an incorporeal hereditament cannot upon the settled principles of the common law be seized under a fieri facias," and that no Maryland statute changed the common law in this respect; also that it appeared by the marshal's return that the franchise was not seized, and therefore the result of a sale "would have been to destroy utterly the value of the property owned by the company, while the creditor himself would most probably realize scarcely anything from these useless canal locks and lots adjoining them;" that the record showed other creditors to a large amount, and that it would be against equity "to allow a single creditor to destroy a fund to which other creditors had a right to look for payment" and destroy the value of the property "by dissevering from the franchise property which was essential to its useful existence," and finally holding that if the appellant had a right to enforce sale of all the property, including the franchise (on which the court declined to express any opinion), his remedy was in chancery "where the rights and priorities of all the creditors may be considered and protected

and the property of the corporation disposed of to the best advantage."

The claim of this Telegraph Company is that it is in the position of telegraph companies under act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." This act gives companies the right to construct and operate their lines "through and over any portion of the public domain" and "over and along any of the military or post roads of the United States," with "the right to take and use from such public lands the necessary stone, timber and other materials for its posts," etc., and provides that such rights and privileges "shall not be transferred by any company acting under this act to any other corporation, association or person." It was stated in *Pensacola Tel Co. v. W. U. Tel. Co.*, 96 U. S. 1, that the telegraph was "an instrument of commerce * * * subject to the regulating power of Congress in respect to their foreign and interstate business and that such a company occupies the same relation to commerce as a carrier of messages as a railroad company does as a carrier of goods." *Ratterman v. W. U. Tel. Co.*, 127 U. S. 425, which decides upon the validity of a state tax upon receipts partly derived from interstate commerce and partly from commerce within the state. No peculiar franchise is granted to this Telegraph Company by its formation as a corporation under the general law or by the provisions of act 75, Laws of 1903.

In *Foster v. Fowler*, ubi supra, also cited for the above statement of Morawetz, a water company was organized under a special act which authorized it to convey water "by pipes or otherwise through public or private grounds," with further powers of appropriating land for buildings, reservoirs, etc. The case was decided on the ground that the privileges were "conferred with a view to the public use and accommodation" that such corporations "cannot voluntarily deprive themselves of the lands and real estate and franchises which are necessary for that purpose," and that such privileges cannot be taken on

execution "because to permit it would defeat the whole object of the charter by taking the improvements out of the hands of the corporation and destroying their use and benefit." The other cases cited, also *Overton Bridge Co. v. Means*, 33 Neb 853, cited in plaintiff's brief, decided upon similar principles are inapplicable to the present case.

Act 75, Laws of 1903, in its preamble is expressed as "An act to provide for the prompt and efficient transmission of messages by means of wireless telegraph," and one of its recitals is that "it is of great benefit to the administration of the government of the Territory of Hawaii, and to the people generally of said Territory, that prompt, efficient and cheap means of telegraphic communication between the different islands of the group be established and maintained." The act provides (section 1) that the company shall construct a system of wireless telegraphy between Kauai and Oahu within three months; (section 2) that within four months it shall make some changes in the location of its present stations on the islands of Molokai, Maui and Hawaii as will insure more efficient service," the changes to be approved by the superintendent of public works; (section 3) that within six months the company shall construct a land telegraph from its wireless station on the island of Hawaii through certain districts on that island; (section 4) that its tariff shall not exceed ten cents a word with a minimum toll of not over one dollar for any message. The act further provides as follows:

"Section 5. That the Inter-Island Telegraph Company, Ltd., shall receive and transmit all messages pertaining to governmental and official business of the different departments of the Territory of Hawaii free of charge."

"Section 6. That the Territory of Hawaii shall pay to the Inter-Island Telegraph Company, Ltd., a subsidy of twelve thousand (\$12,000) dollars each year for the period of two years from the date of the completion of the installations and constructions provided for in sections 1, 2 and 3 of this act, such subsidy shall be payable in equal monthly installments of one thousand (\$1,000) dollars, and it shall be the duty of the

auditor of the Territory of Hawaii to draw a warrant on the treasurer of the Territory of Hawaii, payable to the Inter-Island Telegraph Company, Ltd., on receipt of a voucher signed by the Inter-Island Telegraph Company, Ltd., and approved by the superintendent of public works, showing that the provisions of this act have been complied with by the Inter-Island Telegraph Company, Ltd."

There is nothing in the act which imposes on the Telegraph Company any obligation or which requires it to assume the obligation of transmitting messages for the public or (except as a condition of its receiving payment of a monthly subsidy of one thousand dollars) which requires the company to transmit messages free of charge for the different departments of the Territory. The company, therefore, cannot claim exemption from execution for debt on the ground that its obligatory functions as a quasi public corporation or a government agent would thereby be interfered with or its franchise made useless.

It is claimed by the plaintiffs that mortgaged chattels are not leviable, or if so, they must be sold as a whole, not by selecting essential parts. The right of a judgment creditor to levy execution upon mortgaged chattels is discussed in the following cases:

"While the property remained in the possession of the mortgagor and the condition of the mortgage unbroken, he had an interest subject to his control and disposition. He could sell and deliver such title as remained to him. The purchaser would take it in case of a sale subject to the lien of the mortgage whether its existence was ascertained by the purchaser or not, or whether the mortgagor mentioned or omitted to mention it. It follows of course that the interest of the mortgagor was equally subject to levy and sale by an execution creditor and the purchaser would obtain at such sale the same title as that of which the mortgagor was possessed and no more, no less." *Hamill v. Gillespie*, 48 N. Y. 559. Denio, J.: "I consider it well settled that chattels which have been mortgaged may, notwithstanding, be seized upon execution against the mortgagor, where he is in possession, and at the time of the seizure is entitled to the possession for a definite period against the mortgagee. This was assumed to be the law in *Mattison v. Baucus*,

in this court (1 Comst. 295); and the principle has been repeatedly recognized by the former and the present supreme court and the late court for the correction of errors, and has never, so far as I know, been denied by any court in this state." *Hult v. Carnley*, 11 N. Y. 505.

The law on this subject is far from being settled, but we think the above cited New York cases correctly state the rule.

It was held in *Nott v. Burgess*, 5 Haw. 420, that a mortgagee of chattels is entitled to the possession thereof immediately upon the execution of the mortgage, and also that he has an adequate remedy at law if the mortgagor undertakes to dispose of the chattels for the benefit of his creditors. In the present case it appears that the condition of the Cross mortgage was broken, so that the mortgagee was by the terms of the mortgage entitled to the possession of the mortgaged property. It does not appear whether the condition of the Waterhouse Trust Company mortgage was broken or not. There is a provision in that mortgage in connection with the power of sale that upon default in payment of the note or interest the mortgagee may take possession and sell, but there is no provision that until default the mortgagor may retain possession. Probably the mortgage was drawn on the theory, which is contrary to the rule in *Nott v. Burgess*, that the mortgagor until default could remain in possession. In any aspect of the case we regard the plaintiff's remedy at law as adequate on the authority of *Nott v. Burgess*.

The plaintiff's claim that the mortgaged property, if levied upon and sold at all must be sold as a whole, and not in separate pieces, is based upon the claim that otherwise the interests of the mortgagees may be jeopardized; but the interests of all concerned would be affected injuriously by an unnecessary and superfluous levy and sale of more than is required to satisfy the execution, while for malicious and vexatious use of process the law gives a remedy.

The decree appealed from is reversed and the demurrer is sustained.

Castle & Wilington for plaintiffs.

Robertson & Wilder for defendants.

M. P. FERREIRA, DEFENDANT IN ERROR, v. HONOLULU RAPID TRANSIT & LAND COMPANY, PLAINTIFF IN ERROR.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

ARGUED FEBRUARY 23, 1905.

DECIDED APRIL 7, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN PLACE OF WILDER, J.

STREET CAR ACCIDENT—*contributory negligence—proximate cause.*

One may be liable for injuring another even though the latter has negligently placed himself in a position of danger, and even though it was possible for him, if he had chosen the right course, to extricate himself from such position in time to avoid injury, if it was apparent or ought to have been apparent to the former that the course actually pursued was not likely to be effectual, as, for example, when an electric car going at an ordinary or excessive speed ran into and killed a boy who was riding horseback ahead of the car in a narrow space between the track and one side of the street, and it was or ought to have been apparent to the motorman that there was danger of a collision owing to the fright and fractiousness of the horse and the probable failure of the boy to keep it away from the track on the narrow side,—which the boy was trying to do rather than cross over to the other and wider side of the street.

INSTRUCTIONS—*applicability.*

It is not error to refuse to give instructions that are inapplicable to the facts of the case even though they may be correct as abstract propositions or as applicable to other facts.

Id.—*refused—substantially covered by other instructions.*

It is not error to refuse requested instructions the substance of which is sufficiently covered by other instructions that are given.

EVIDENCE—*what admissible on question of damages in action for death by wrongful act.*

In an action by a father for the death of his son, evidence is admissible, on the question of damages, tending to show the capability of the son to earn certain wages in the class of work in which his father is engaged, the kind and value of the services actually performed by the son for his father before his death, and the size and character of the father's family.

DEATH BY WRONGFUL ACT—*action for.*

An action may be maintained in this jurisdiction by a father for the death of his son caused by the negligence of another.

Id.—*damages—not excessive.*

A verdict of \$3000 in an action by a father for the death of his son is not so excessive as to require a new trial, when there was evidence that the son was 15 years old, healthy and strong, that he performed services worth \$25 a month to his father and which might be worth \$35 a month to others, that he might earn \$2 a day in the occupation in which his father was engaged, that the father had a wife and ten children, and that the funeral expenses were \$216.50.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for damages for the death of the plaintiff's son, who was killed in a collision with one of the defendant's electric cars on November 12, 1901. A verdict was rendered against the defendant, the plaintiff in error, for \$3000. There are forty-five assignments of error.

The accident occurred under the following circumstances: The plaintiff's son Manuel, with two others, Kapena and Holt, were riding on horseback down Liliha street between Wyllie and Judd streets in Honolulu on the northerly side of defendant's track. As the space between the track and the side of the street narrowed Kapena and Holt crossed over to the south-erly side of the track and called to Manuel to do likewise, but the latter replied that he was all right and that there was plenty of room on his side, and continued on that side. His horse became uneasy as the car approached from behind and the nearer the car came the more frightened did the horse become,

Manuel meanwhile endeavoring to keep the horse from the track, until finally, when the car overtook him the horse got in front of the car and was struck by it and the boy was thrown off and run over by the car. The car was on a down grade going at a rate variously estimated, but no attempt was made to slow down or stop the car until the collision occurred. When the car was stopped the boy was found dead under the front wheel on the northerly side.

The main question is whether the evidence as a whole shows that the plaintiff made out a case upon which a verdict for him can be supported on the evidence. This question is raised by exceptions taken to the refusal to order a nonsuit at the close of the plaintiff's case and a refusal to direct a verdict at the close of the defendant's case. The defendant contends that no negligence was shown on the part of its employees in charge of the car, and that if there was such negligence there was also contributory negligence on the part of the boy. The question is whether there was any substantial evidence upon which the verdict could properly be based. It is not a question of the strength or weight of the evidence or the credibility of the witnesses, or whether the jury might properly have found for the defendant but whether it might properly have found, as it did find, for the plaintiff. Many of the principles of law involved in cases of this kind are set forth in *Dong Chong v. Rapid Transit Co.*, ante, p. 272, and the ground there covered need not be traversed again in the present case.

Much testimony was introduced upon the question of the speed with which the car was moving at the time. The only person who saw the accident besides Manuel's two companions, already mentioned, were the conductor and motorman of the car, who left the Territory before the trial and whose testimony was not obtained, a boy named Fuller, who was the only passenger, and a woman named Kaili, who was on the veranda of her house about 450 feet away. Kapena testified that the car was going fast—about twenty miles an hour he thought by comparison with the speed of a horse with which he was familiar,

he never having ridden on an electric car. Kaili testified that it was running fearfully. Fuller testified that it was going very fast and that when it was suddenly stopped at the time of the collision, he, then standing up and holding on to the arm of a seat, was nearly thrown from the car. The defendant endeavored to show that the car was going at a very moderate rate—by calculations from the supposed distance between the car and the boys when the car first came in sight of Kaili, the supposed distance from where the boys were at that time to where the accident occurred, and the rate of speed at which the boys were riding, which, as all agree, was slow; also by testimony as to how near to the car, when it stopped, hoof marks were found on the ground on the northerly side of the track soon after the accident, and as to the distance within which the car in question was stopped when going at different rates of speed at the place in question some time afterwards, etc., etc. Whether the evidence upon this point taken as a whole was sufficient to justify the jury in finding, if it did so find, that the car was moving at a dangerous rate of speed or at a speed in excess of that, namely, 12 miles an hour, allowed by law at that place, it is unnecessary to say, although it may be stated that some of the assumptions relied upon by the defendant in making these calculations are not of a very satisfactory character and that the result arrived at from these calculations is such a low rate of speed as to suggest possible error in such result, considering all the circumstances. What the jury found in regard to the rate of speed does not appear, as the verdict was general, but even if it found that the rate was no greater than the evidence of the defendant alone would justify it in finding, still there were other circumstances which taken in connection with such rate of speed would support a verdict for the plaintiff.

We cannot say as a matter of law that it was negligent for the boy to ride on horseback on the northerly side of the track, although the space between the track and the side of the street at that point was perhaps not over nine feet in width. His horse was gentle and tame and had been ridden by him for

several years, and up and down the street in question many times. Even if the boy was negligent in riding upon that side of the street, it would not necessarily follow that such negligence was a proximate cause of the accident so as to avoid liability on the part of the defendant. The servants of a street car company may not with impunity recklessly injure others even though the latter have been placed in positions of danger through their own negligence. It is well settled that even though one negligently places himself in a position of danger, another who causes him injury may be liable notwithstanding, if he does not take reasonable precautions to avoid doing injury when he has notice or such knowledge as ought to give him notice of the danger. But it is contended that this rule has no application when the negligence of the complaining party continues up to the time of the accident and is contemporaneous with the negligence of the party sought to be charged. That is true under some circumstances. But it is not always true that there is continuing negligence within the meaning of this qualification of the general rule merely because the complaining party remains in a position of danger in which he has negligently placed himself. If one after placing himself in a position that he knows or subsequently discovers to be dangerous cannot extricate himself from such position in time to avoid injury, or even if, though it may be possible to avoid the injury, it is clear to the other party that an ineffective method of avoiding it is being pursued or that the method pursued is not likely to meet with success, it would be the duty of such other party to avoid the injury, if he reasonably could, and he would be liable if he did not.

In the present case nothing was attempted to be done by those in charge of the car to avoid the collision until it was impossible to do anything. The question then arises whether the motorman or conductor knew or ought to have known that the boy was in a dangerous position, particularly by reason of the conduct of his horse, and that he was not likely to extricate himself. It may be that if there was nothing to indicate that there

was danger of a collision by reason of the fright of the horse there would be no negligence in conducting the car at a usual and proper rate when the boy was riding in the narrow place or that, if that would be negligent, it would be equally negligent for the boy to ride where he was, for it might be said that the conductor and motorman would be justified or not justified equally with the boy in considering that there was no danger so far as the boy's riding in the narrow space and the car's going at what would usually be a proper rate were concerned. But in this case the actions of the horse were such as would support a finding by the jury that there was danger of a collision and that those in charge of the car knew or ought to have known of such danger in ample time to avoid it, and that the boy, although attempting to avoid it, was very likely to fail.

There was nothing to obstruct the motorman's view. The road was straight and the car was coming down hill with nothing on the street in front for a long distance except the three boys on horseback. The horse began acting badly, or at least the jury might have so found, long before the car reached the place of the collision, and acted worse the nearer the car got. The motorman was facing the horse and was or ought to have been fully aware of the situation. He could easily control the car. The boy's back was towards the car, as he was going in the same direction some distance ahead. He was having difficulty with his horse and endeavoring to keep away from the car track on the northerly side. If, as the defendant contends, he could have crossed to the other side, which was wider, still the jury might have found that the danger of his position owing to the action of his horse did not become evident until it might have been equally or more dangerous to have crossed the track in front of the approaching car. But even if he might have crossed the track in safety and even if that would have been the wiser course for him to take, still it was or ought to have been apparent to the motorman that he was not intending to take that course, and the wisdom of taking that course after the horse began to act badly and the car drew near may not have

been apparent to the boy, whose back was to the car and who had his attention occupied with the actions of his horse. The defendant's summary of the testimony as to the conduct of the horse is not altogether accurate. The testimony was in part as follows: Kapena testified that "the horse was skittish and the car drew near and the horse began to prance or to show fright. . . He (Manuel) was a little ahead of us because that horse was acting more active than ours, he was sidling off and we were going slowly. . . When I said that the car was about as far from us as the statue out there (about 70 yards), that is the time the boy's horse was acting very fractious. . . The horse was so scared that the horse was endeavoring to go across because it was scared and the boy was endeavoring to keep the horse away from the track until the car run up and struck the horse. . . The horse was restive and prancing about and endeavoring to jump on to the track and the boy was trying to wrench him away from it. . . The horse was restive and throwing itself about until the car came up and struck the horse; the boy was endeavoring to keep it away from the track." Kaili testified that the horse was "prancing" when the car was a long way off. Fuller, who had ridden up on this car to the end of the line and had passed the boys on horseback when on that trip and who on the return trip in question had stood up from sitting on the rear seat looking backwards and turned around, testified, when asked what had attracted his attention, "Because we had gone up first and noticed him and we noticed him on horseback and we noticed that the horse acted curious. I wanted to take notice how the horse acted, whether he was still showing fear or skittishness as he did before. He was scared, jumping, prancing up and down, and jumping here and there from one side to the other." Holt, a witness for the defendant, testified: "A little ways down I noticed the horse was kind of jumping, the horse was standing, prancing, jumping." He began to jump "below Ahlo's gate (several hundred feet from the place of the accident.) The car was coming near us then on our way down,

when the car was kind of near to us the horse started to jump more and got frightened at the car then . . . jumped sideways toward the track and then the boy was holding the lines. I don't know if he was trying to keep the horse back I think from jumping, and then the horse turned around and faced the ditch instead of the track, he faced the ditch and backed on to the track." It is clear that there was sufficient evidence to support a verdict for the plaintiff.

It is contended next that the trial judge erred in giving certain instructions requested by the plaintiff and in refusing certain instructions and modifying others requested by the defendant in regard to contributory negligence. The law involved in these instructions has been considered already in a general way, and the arguments in regard to them are largely the same as under the more general points already covered, except that they are more specific in form. We need not go over the ground again. In our opinion, considering these instructions as a whole, their wording and the evidence in this case, as well as other instructions which partially cover the same ground, no reversible error was committed in connection with these instructions. Those requested on each side were taken from or based on statements in text books or decisions, and may all be substantially correct when considered abstractly or in connection with particular circumstances. But what may be a proper instruction in one case may not be in another. The defendant's contentions in regard to these instructions fall with its contentions disposed of on the question of the sufficiency of the evidence. Of these instructions, those given at the plaintiff's request are as follows:

5. "If the jury believe from the evidence that the motorman in charge of the car belonging to the defendant company knew or could have known by the exercise of ordinary care that the car under his control had so far excited the horse of the deceased or that the horse of the deceased was so far excited from any cause as to frighten him or render him unmanageable, then it became the duty of the motorman to take such steps for the safety of the deceased as ordinary prudence might suggest, and

if the jury further believe that the motorman failed in such duty and that in consequence of such failure the deceased met with his death, such failure constitutes negligence for which the defendant company is liable and your verdict must be for the plaintiff."

9. "Even should you believe from the evidence that the Waikiki side of the highway upon which deceased was riding at the time of his alleged wrongful killing was in better and more passable condition than was the Ewa side of said highway, and that the deceased was incautious in then riding upon and remaining on the Ewa side of said highway and the Ewa side of said defendant company's track, still the company was bound to the exercise of ordinary care and vigilance to avoid the accident. It could not recklessly and without proper care run its car, and then when injury resulted to a person, escape liability on the ground that such person was negligent in the first instance. The rule of law is not open to doubt that where the injured party was negligent, in the first instance, such negligence will not defeat recovery if it be shown that the defendant might have avoided the injury by the exercise of ordinary care and reasonable prudence."

10. "It is the duty of an electric railroad company to use all reasonable effort to avoid injury to one who has negligently or incautiously placed himself in a position of danger, if the peril is known, or by reasonable care might have been known, and a failure to observe this duty renders the company liable, notwithstanding the previous negligence of the person injured. If you believe from the evidence in this case that the deceased was negligent in riding upon the Ewa side of the defendant company's track and thereby placed himself in a position of danger, you will then consider whether or not his danger was known to the motorman of car No. 4 of the defendant company, or by reasonable care might have been known to the motorman and whether under the circumstances the motorman used ordinary care and prudence to avoid injury to the deceased; and if you are satisfied by a preponderance of the evidence that the motorman did know, or by reasonable care might have known, the peril of the deceased, and that he failed to use all reasonable efforts to avoid injury to the deceased, and that by reason of such failure the injury occurred, it will be your duty to return a verdict for the plaintiff."

The instructions asked by the defendant on this point and refused were as follows:

10. "Where the deceased sees an approaching car or is warned of its approach and does not take proper steps to avoid it, the company is not responsible for the accident."

13. "If you find from the evidence that the deceased was, up to the time that the car came up to him, upon the Ewa side of the track and outside the rails, and that as the car came up his horse suddenly turned across the track and was struck by the car, that he was thrown upon the track and run over by the car and killed, as there is no other evidence in the case upon which you can find a verdict for the plaintiff, I instruct you that if you find these facts, that your finding must be for the defendant."

14. "If a rider allows his horse to linger by the side of the street car line until the horse becomes unmanageable and dashes upon the track, the defendant would not be responsible for that act."

17. "If the gripman saw that plaintiff's horses were restive, it does not follow that he had reason to apprehend the accident that occurred. This fact alone would not be sufficient proof of negligence."

19. "Where by the slightest care and effort on the part of the deceased he could have put himself out of danger up to the time he was struck, although the defendant may have been negligent, no recovery can be had."

The instructions asked by the defendant but given only as modified were as follows:

5. "I instruct you that even though you find that the defendant was guilty of negligence, if you also find that the negligence of the plaintiff's intestate contributed to the loss complained of, you must find for the defendant."

This was modified by striking out "plaintiff's intestate" and inserting "deceased by his actions and conduct, directly and proximately," and by striking out "loss complained of" and inserting "happening of the accident complained of."

9. "A proper enforcement of the rights of the parties will defeat a recovery where the deceased has in disregard of the rights of the company placed himself in a position of danger, even if the collision was caused in part by failure of the company to exercise ordinary care."

This was modified by adding at the end: "Unless the employees of the defendant company in charge of the car could, by the exercise of ordinary care, have discovered the position of danger in which the deceased had placed himself, in time to have avoided the accident."

A second group of instructions in connection with which error is alleged, relate to the question of wantonness in the conduct of the defendant's servants in charge of the car. The errors alleged consist in refusals to give the following instructions requested by the defendant:

11. "If a horse takes fright at an approaching car, and because the car is not stopped, becomes unmanageable and runs away, injuring a rider, whether the injury was ultimately caused by contact with the car or not, the company is not liable unless there is wanton or malicious disregard of the rights of the rider, of which there is no evidence in this case."

18. "If you find from the evidence that the deceased placed himself in a dangerous position with regard to the tracks and cars of the defendant corporation and continued in that position up to the time of the accident, when he could have changed his position to one which would not have been dangerous, although the defendant may be negligent, the defendant was guilty of contributory negligence and no recovery can be had unless there is proof of wantonness or recklessness on the part of the defendant corporation or its employees."

20. "There is nothing in the circumstances of this case to indicate any wantonness or recklessness on the part of the defendant corporation or any of its employees."

These propositions are open to several objections. Numbers 11 and 20 particularly are objectionable because they practically amount to a direction to find for the defendant. Number 18 is objectionable not only because it tends by the use of the words "wantonness or recklessness" to indicate that something more than negligence or want of due care under the circumstances was required in order to render the defendant liable, but also because it appears to imply that the defendant would not be liable if the deceased could have got out of danger irrespective of the time when he could have done that, and irrespective

of what might have appeared to the motorman a probably ineffective effort on the part of the deceased to do that.

The next group of instructions to be considered relates to the rights of the defendant corporation in the streets. The defendant contends that error was committed in giving the following instruction requested by the plaintiff:

1. "I instruct you, gentlemen, that the defendant company had the right to use the public highway known as Liliha street and that the deceased had also the right to use that highway or any part of it. Neither of them had an exclusive right, but the right of the defendant company is superior to that of the general public in the use of that portion of the street occupied by its track or tracks, and whenever a person, wagon or other vehicle is on the track in advance of a car belonging to the defendant company he or it is bound to get out of the way when possible and not to obstruct the passage of the car. Further than this an electric company has no rights on a highway superior to the rest of the public."

And in refusing the following instructions requested by the defendant:

7. "The motorman was the servant of the quasi public corporation, which enjoyed privileges granted to it by the legislature in consideration of its duty to transport passengers safely and more speedily than they are ordinarily carried in vehicles drawn by horses. People who pay their money in the reasonable expectation of being carried expeditiously are not to be delayed by every person who ventures to test the nerve of a horse by riding it along the same street on which a company runs its cars by electricity."

8. "The defendant has from the necessities of the case and by the law a superior right of way on that portion of the street upon which it alone can travel paramount to that of those traveling in vehicles, on horseback, or on foot. This is not an exclusive right, but being to the extent stated, paramount, it will be enforced against all who needlessly impose obstacles to its free and unrestricted exercise. Other travelers therefore must yield the right of way."

12. "Motormen are not required to stop their cars and slack their speed because timid horses may become frightened or already manifest symptoms of fear. The public, for whose service the railway is being run, have a right to demand that its

regular schedule shall be carried out and that the company shall not be embarrassed by numerous delays, which would defeat the very purpose for which the franchise is granted."

The refusal to give number 7 is not made the subject of an assignment of error, but that and numbers 8 and 12 are misleading, too general and not applicable to the facts of this case. The defendant received the benefit of so much as might properly be given on these points in other instructions. Plaintiff's requested instruction number 1 is objected to because it does not recognize the defendant's statutory right of way and incidentally because it instantiates and limits the defendant's right of passage to the single case of a "person, wagon or other vehicle" on the track in advance of the car, and because it assumes that the deceased was on the track when, as contended, he was only near the track. It was unnecessary to state whether the defendant's right was statutory or other. We cannot perceive how the jury could have been misled by the reference to only a "person, wagon or other vehicle" in the illustrative way in which that reference was made. It does not appear that the horse was not on the track some of the time. Even if it was not on or between the rails it might have been within line of the side or running board of the car. The jury could not have been misled by such a technical inaccuracy, if it was an inaccuracy.

A number of alleged errors relate to rulings in admitting or excluding evidence. Several of these are relied on in the brief. The first, which is based on an alleged refusal to strike out certain testimony as to the plaintiff's duties in the warehouse in which he was employed, is without foundation, as the transcript shows that the testimony was stricken out. Another is based on a refusal to exclude the question put to a witness to "state from your knowledge and employment of labor, what the wages of a boy in this condition and similar station in life would be worth for Irwin & Company." This was asked of a witness who had long been in charge of the shipping department of Irwin & Co., where the plaintiff worked, and after testimony by this witness as to the plaintiff's work there, the work of stevedores there

generally, the deceased boy's ability to do such work, etc. The only objection made at the time was that the question was limited to Irwin & Co. We find no reversible error in allowing this question. Several questions were asked the plaintiff as a witness as to the work of the deceased in various particulars and, among others, in delivering milk that was sold by the plaintiff. Those in regard to the milk were objected to on the ground that proof that the services of the son were profitable to the father would not show the son's earning capacity. We cannot see that the defendant was harmed by the allowance of this question. A question was allowed to be asked the same witness as to the size of his family. There was no error in this. The only objection now made to all these questions is that they tended to prejudice the jury. The case relied on to show that there was error in this respect, *Fox v. Oakland C. S. Ry.*, 118 Cal. 55, is not in point.

There was no error in refusing to direct a verdict requested for the defendant on the ground that an action cannot be maintained in this Territory by a father for the death of a minor child. *Kake v. Horton*, 2 Haw. 209; *Puuku v. Kaleleku*, 8 Haw. 80; *Kekauoha v. Sch. Robert Lewers Co.*, 1 Estee 75; 114 Fed. 849. It is true that in the cases cited the actions were by widows for the deaths of their husbands, but the reasoning upon which the decisions were based is equally applicable to actions by parents for the deaths of their children.

It is contended finally that the damages awarded are excessive. The jury were instructed that the measure of damages is the pecuniary value of the child's services during his minority and the costs and expenses incurred by the parent on account of the injury, less the usual and reasonable expenses of caring for and rearing the child. The pecuniary value referred to in this instruction would include not only what the child might earn during the remainder of his minority but also the value of his services in the family, including acts of kindness and attention, but would not include anything by way of solatium, as, for the grief, anguish or wounded feelings of the plaintiff, and, of

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course, would not include anything for the injury to the deceased. It would include the material as distinguished from the sentimental losses of the father. The only special expenses proved were the funeral expenses, amounting to \$216.50. This deducted from the amount of the verdict, \$3000, would leave \$2783.50 as the amount awarded for the value of the child's services less the cost of caring for him. The evidence shows that the deceased was a boy 15 years old, well developed, healthy and strong. The plaintiff testified that the boy had completed his time at school two years before his death, that he looked after the cattle, took them to pasture, cut grass for them, milked the cows, delivered the milk to customers, chopped wood, etc., and that his services were worth \$25 a month to the witness and might be worth \$35 to others, also that the boy sometimes worked for others. There was also testimony by one who had long employed the plaintiff as a stevedore and had had much experience in employing stevedores and who had seen the boy in question, that the boy was probably capable of doing an ordinary man's work as a stevedore and that, if so, he could earn \$2 a day in that class of work. The plaintiff had a wife and ten children. In view of this evidence, although the damages seem rather large, we cannot say that they were so excessive as to require a new trial or a remittitur of part of the damages. See *Franke v. City of St. Louis*, 110 Mo. 528; *Chicago & E. R. Co., v. Branyan*, 10 Ind. App. 577, 585, and cases collected in *Hale on Damages*, 324, note, and 15 Cent. Digest, 2675. Damages in cases of this kind are largely prospective and necessarily somewhat indefinite and incapable of being estimated with any approach to accuracy.

The judgment is affirmed.

E. M. Watson and Holmes & Stanley for plaintiff.

Castle & Withington for defendant.

J. O. CARTER, W. O. SMITH, S. M. DAMON, W. F. ALLEN AND A. W. CARTER, TRUSTEES UNDER THE WILL OF B. P. BISHOP, DECEASED, *v.* LULIA (w).

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MARCH 21, 1905.

DECIDED APRIL 10, 1905.

FREAR, C.J., WILDER, J., AND CIRCUIT JUDGE LINDSAY IN PLACE OF HARTWELL, J.

ADVERSE POSSESSION—*evidence.*

Declarations of defendant while in possession of land as to her claim thereto, particularly when made in consequence of ejecting certain persons therefrom, are admissible.

Evidence that defendant had paid no taxes on the land in dispute held admissible under the circumstances of this case.

PRACTICE.

Plaintiff has the right to open and close. Revised Laws, Section 1768.

OPINION OF THE COURT BY WILDER, J.

This is an action of ejectment. Plaintiffs' paper title was admitted and the defense was adverse possession. The jury returned a verdict for plaintiffs, and the case comes to this court on defendant's exceptions.

The main exceptions relate to the admissibility of certain declarations made by the defendant to one David Baker. It appears that this David Baker leased to certain Chinese a piece of land near, and perhaps including a part of, the land in dis-

pute. The Chinese lessees attempted to cultivate a portion of the land in dispute and were driven off by defendant, in consequence of which Baker went to defendant and asked her why she had put his Chinese tenants off the place. She replied that the property was hers and that David Baker had no right to it. Defendant contends that these declarations were admissible. Plaintiffs contend that they are admissible only if made as part of the *res gestae*, and also that, even if admissible, they were only cumulative because three other claims of ownership made by defendant while in possession were admitted in evidence. There appears to be no reason why these declarations of defendant to Baker should not have been admitted. Statements by defendant made in connection with her possession and tending to show the character of her possession are admissible.

In *Knight v. Knight*, 178 Ill. 553, 556, it was said: "The court permitted appellees to put in evidence declarations of their ancestor while he was in the possession and control of the property after the execution and delivery of the deed to appellant, such declarations being, in effect, bare assertions of a present claim of ownership of the premises. There seems to be unanimity in authorities that such declarations are admissible when accompanying an act of possession which is provable. The declarations in such instances are regarded as part of the act, or a 'verbal act' indicating present purpose or motive. Whether, to be regarded as admissible in evidence, the declaration must be shown, in such cases as this, to be contemporaneous with some distinct and particular act of possession has been questioned by respectable authorities. The fact here involved is possession of the premises for the prescribed period of time under claim of title. Actual possession for that period is in the nature of a continuous act, and the better view is, that particular acts of dominion over the property, and the declarations of the possessor while in possession as to his claim to the property, though not accompanying an act of possession, are of the *res gestae* of the fact involved, and hence equally admis-

sible evidence. In *Duffy v. Presbyterian Congregation*, 48 Pa. St. 51, it was well said 'the declaration of a person in possession of land (as to his claim of title) are always received as explanatory of the title he is claiming; they are part of the *res gestae* of his possession.' In *Recard v. Williams*, 7 Wheat. 59, speaking upon the same point, it was said: 'From the very nature of the case, therefore, it must depend upon the collateral circumstances what is the quality and extent of the interest claimed by the party (in possession), . . . and the declaration of the party while in possession, equally with his acts, must be good evidence for the purpose.' The rule was fully stated by the Supreme Court of the State of Wisconsin in *Austin v. Allen*, 6 Wis. 134, and reiterated by the same court in *Rocke v. Andrews*, 26 Wis. 311. The same rule obtains in the courts of California. (*Stockton Savings Bank v. Staples*, 98 Cal. 189.) The principle upon which the admissibility of such evidence rests is stated in 1 Greenleaf on Evidence, Secs. 108, 109. See, also, *Amick v. Young*, 69 Ill 542. That such oral declarations are admissible is clearly recognized in *James v. Indianapolis and St. Louis Railroad Co.*, 91 Ill. 554; *Shaw v. Schoonover*, 130 id. 448; *Grim v. Murphy*, 110 id. 271; *Illinois Central Railroad Co. v. Houghton*, 126 id. 233 and *Shaw v. Smithies*, 167 id. 269."

The fact involved in the case at bar is the possession of the land in dispute for the prescribed period of time under claim of title. And declarations of the possessor while in possession as to her claim to the land, particularly when called forth by reason of ejecting certain persons from the land, are admissible.

For the error in excluding these declarations a new trial should be had.

The other points will be disposed of in order that they may not be raised again on the new trial.

The contention that defendant had the right to open and close the case, because she admitted plaintiffs' paper title and had the burden of proof, is disposed of by section 1768 of the Revised Laws.

The following question was asked of James L. Holt, Deputy Tax Assessor of Honolulu: "State the result of your findings as to when, if ever, the defendant in this case, Lulia, made return and paid taxes on land in Puunui, L. C. A. 1280 and 5579B. to Kaaha." Defendant Lulia had already testified, in answer to juror's question and without objection from her counsel, that she had paid taxes on the land in dispute since 1898. Plaintiffs asked her on cross examination if it was not a fact that she had made no return and paid no taxes on the land until the year 1901, to which she replied that she had paid taxes on it previously. Defendant claims that although she might have shown a return and payment of taxes, yet, as she had not done so, the plaintiffs could not show her failure to return and pay taxes. She did testify, however, in answer to a juror, and without objection from her counsel, that she had paid taxes since 1898. Counsel cannot sit by and let jurors question his witness and then take the benefit of the answer if favorable and not the consequences if unfavorable. We are of the opinion that no error was committed by the trial court in allowing this question to be answered.

There is no merit in defendant's contention that certain of the court's instructions were ambiguous.

For the reasons above given the exceptions are sustained, the verdict set aside and a new trial ordered.

Holmes & Stanley for plaintiffs.

Castle & Withington for defendant.

J. H. HOWLAND, SUPERINTENDENT OF HONOLULU
WATER WORKS, *v.* OAHU RAILWAY & LAND
COMPANY.

SUBMISSION WITHOUT ACTION.

ARGUED APRIL 5, 1905.

DECIDED APRIL 10, 1905.

HARTWELL AND WILDER, JJ., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF FREAR, C.J.

The question of law submitted by the parties is whether the Oahu Railway & Land Company "is exempt under the public statutes of the Territory and under its charter and contract with the Minister of the Interior" from the payment of "water rates from the government pipes in Honolulu, to wit: Water at its round-house for the purpose of supplying locomotives with water; water at its station in Honolulu for ordinary lava-tory and irrigation purposes, and other water necessary for the purposes of its railroad." The superintendent of Honolulu water works demanded of the defendant \$151.50 for the six months ending December 31, 1904, and a like sum for the six months ending June 30, 1905, for the water which was used by the defendant for the purposes above mentioned.

The General Railway Law of 1878, sections 783, 784, R. L., authorized a contract to be made with persons associated together under the general corporation law for building and operating a railroad, granting to such corporation right-of-way through government lands and such government lands "as may be necessary for their buildings, stations, depots, and stores, or other structures, and also the free use of water, to any corporation as aforesaid for the purpose of building such

railroad or railroads." The Oahu Railway Act, Chapter 65, authorized a contract with a corporation organized under section 810, R. L., "for the constructing and operating on the island of Oahu a steam railroad" and in such contract to confer upon such corporation "all such rights and privileges as to the acquisition of rights-of-way and other privileges for the construction, maintenance and operation of such roads, together with all depots, stations, yards, crossings, wharves and equipments as are set forth in chapter 64, except as the same are modified by the provisions of this chapter."

Per curiam: The contract and the statute on which it was based authorized the use of the government water for which the plaintiff's demand was made, not only in the construction but also in the maintenance and operation of the railroad.

Attorney General Andrews for plaintiff.

Ballou & Marx for defendant.

J. NOTT v. J. SILVA.

QUESTIONS RESERVED BY CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 7, 1905.

DECIDED APRIL 10, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

COSTS ON APPEAL—attorneys' fees not allowed defendant when plaintiff's judgment reduced one-fifth.

Attorneys' fees in actions of assumpsit payable under Rev. L., Sec. 1892, by the losing party and consisting of percentages of the amount for which judgment is obtained by the plaintiff or the amount sued for if judgment is obtained by the defendant, are not allowable to the defendant under Sec. 1893, which provides, as an exception to the general rule, that costs shall be awarded to a defendant appellant if the amount recovered by the plaintiff in the court below is reduced one-fifth or more on the appeal.

OPINION OF THE COURT BY FREAR, C.J.

This is an action of assumpsit. The plaintiff obtained judgment in the district court for \$97.57, exclusive of costs, which was reduced to \$72.50, that is, by more than one-fifth, on the defendant's appeal to the circuit court. The questions reserved may be summed up in the question, which party is entitled to the attorneys' fees allowed by section 1892 of the Revised Laws, in view of the provisions relating to costs on appeal found in section 1893? Section 1892 and the portion of section 1893 that is applicable are as follows:

"Sec. 1892. Attorneys' fees in assumpsit. In all the courts of this Territory, in all actions of assumpsit there shall be taxed as attorneys' fees, in addition to the attorneys' fees otherwise taxable by law, to be paid by the losing party and to be included in the sum for which execution may issue, ten per cent. on all sums to one hundred dollars, and two and one-half per cent. in addition on all sums over one hundred dollars, to be computed on the excess over one hundred dollars. The above fee shall be assessed on the amount of the judgment obtained by the plaintiff and upon the amount sued for, if the defendant obtain judgment."

"Sec. 1893. Costs on appeal. Costs shall be allowed to the prevailing party in judgments rendered on appeal, in all cases, with the following exceptions and limitations:

"1. If the defendant against whom judgment is rendered appeal, and the amount recovered in the court below be reduced one-fifth, or more, costs shall be awarded to the appellant."

The plaintiff concedes that all ordinary costs should be allowed the defendant under subdivision 1 of section 1893. The defendant contends that the attorneys' fees allowed by section 1892 should likewise be allowed him on the theory that they are costs. Much can be said in support of the view that such fees are costs generally speaking. They are in the nature of costs and the section providing for them was originally part of an act relating to costs. Moreover, the "attorneys' fees otherwise taxable by law" referred to in this section, and "in addition to" which the fees in question are allowed, are clearly

costs, as appears by section 1889. The question, however, is not whether such fees are costs generally speaking, but whether they are costs within the meaning of section 1893. In our opinion they are not.

In the first place, section 1892 relates to fees in a special class of cases, namely, actions of assumpsit, and was originally part of a much later statute, namely, an act of 1872, while section 1893 is a general provision and was originally part of the judiciary act of 1847—re-enacted with some modifications as part of the Civil Code of 1859. The former should control if there is any conflict between them. Again, these fees are in the nature of commissions estimated by percentages of the amount for which judgment is obtained or the amount sued for, according as judgment is obtained by the plaintiff or the defendant, and it would seem absurd for a defendant to recover commissions upon a judgment obtained against him by the plaintiff. But what would seem to be conclusive is the express language of the section. The fees are to be paid by the losing party and are to be included in the sum for which execution may issue." The defendant is the losing party and it is against him that execution would ordinarily issue. It is further provided that these fees shall be "assessed on the amount of the judgment obtained by the plaintiff and upon the amount sued for if the defendant obtain judgment." In this case the judgment was obtained by the plaintiff and the defendant did not obtain judgment. The judgment referred to is the judgment in the action, and not the mere fact of partial success on the appeal by way of obtaining a reduction of the judgment.

But the defendant contends that he obtained judgment within the meaning of section 1893 at least, because he was successful on the appeal—to the extent of obtaining a reduction of the plaintiff's judgment. It is true that, immediately prior to the enactment of the Revised Laws, subdivision 1 of this section contained, after the word "appeal," the words "and judgment is rendered in his favor in the appellate court," but these words were practically surplusage and merely an infelicitous

mode of referring to a judgment reduced rather than rendered in favor of the defendant, as held in *Nakanelua v. Kailianu*, 5 Haw. 179, and the first paragraph of this section shows that within the meaning of this section a defendant in whose favor a judgment for the plaintiff is reduced is not a party obtaining judgment, for the case of a defendant in whose favor a judgment for the plaintiff is reduced is stated as an exception to the cases of a "prevailing party in judgments rendered on appeal."

Our conclusion is that the plaintiff is entitled to the attorneys' fees allowed by section 1892.

G. A. Davis for the plaintiff.

C. Creighton for the defendant.

IN THE MATTER OF THE APPLICATION OF
HAWAIIAN DREDGING COMPANY, LIMITED,
FOR A WRIT OF MANDAMUS AGAINST C. S.
HOLLOWAY AS SUPERINTENDENT OF PUBLIC
WORKS OF THE TERRITORY OF HAWAII.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED APRIL 5, 1905.

DECIDED APRIL 12, 1905.

HARTWELL, J., AND CIRCUIT JUDGES DE BOLT AND LINDSAY IN
PLACE OF FREAR, C.J., AND WILDER, J.

**PAROL EVIDENCE RULE—contemporaneous oral agreement postponing
time of performance of written contract.**

December 3, 1903, the respondent entered into two contracts with the petitioner, one for dredging section 1 and the other for dredging section 3 of Honolulu harbor, in accordance with plans and

specifications annexed and forming a part thereof, the contracts requiring the petitioner "to complete the same on or before the 31st day of March, 1904;" the specifications requiring that the "work must be completed within ninety days from starting the work," also that "payments will be made upon monthly estimates of the quantity of material removed to eighty per cent. of such value." When the contracts were made it was estimated by the parties that after paying for section 1 about \$3,000 would remain from the loan fund appropriation, and it was mutually understood that only the contract for section 1 should be performed until there should be funds available for the other section and the respondent should so notify the petitioner. After completing section 1 the petitioner May 6, 1904, informed the respondent that it had done so and was ready to start on section 3, "waiting for your instructions before commencing." At the suggestion of the petitioner the respondent wrote June 14, 1904, "It will be impossible to carry out the contract for dredging section 3 of the Honolulu harbor at the present time, as there are no funds available for this work." October 27, 1904, respondent wrote to the petitioner, "I should like to have the work of dredging a portion of slip No. 1 between the Hackfeld and Oahu Railway & Land Company's wharves taken up immediately," stating that the work would "make up a total yardage of approximately 9,700 cubic yards," and that "I do not feel that it will affect your contract with the government to dredge section 3." After completing slip 1 petitioner notified the respondent November 26, 1904, that it had done so and that it was "prepared to continue the work of dredging said section 3," to which letter respondent answered November 29, "I have been given to understand that you are continuing the work of dredging section 3 of the Honolulu harbor without any authorization from me, and wish to state that this action is entirely at your own risk." The petitioner nevertheless went on with the work and December 1 asked for a survey and estimate "under our contract for section No. 3 for the month of November," which the respondent declined. Held: (1) The respondent in engaging the petitioner to dredge slip 1 did not intend that this should be the beginning of the contract for section 3, but that the slip alone should be dredged at a cost of about \$3,000, and that this should not affect the petitioner's contract to dredge the entire section "In case further appropriations are made by the legislature for carrying out this work." (2) The law permits a party to a written contract to show that an oral agreement was made at the time when

the contract was executed or subsequently, postponing the time of performance named in the contract, or that the contract was made on condition that the time of performing it should be postponed from the time named in the contract until the party for whom the service was to be performed should notify the other party to begin it or until there should be available funds to pay for the work agreed upon.

Id.,—*writ of mandamus.*

Held: The circumstances in this case do not permit a writ of mandamus to be issued compelling the respondent to measure and estimate the work done by the petitioner outside of slip 1 in section 3 as done under the contract as modified by the oral agreement.

Statement of the case: As set forth in the respondent's brief, the petitioner sought by mandamus to "compel the superintendent of public works of the Territory of Hawaii to make a survey and estimate of certain dredging work, claimed to have been performed by petitioner under the provisions of a contract entered into by the petitioner and respondent, and to compel respondent to draw and approve a voucher for the payment of such estimate. To the alternative writ, respondent demurred, and upon the overruling of such demurrer, made his return or answer to said writ and thereupon the suit came to trial. After petitioner had rested, respondent made a motion to dismiss the alternative writ, and upon the overruling of said motion, respondent, satisfied with the showing as then made by the petitioner, introduced no evidence and rested. After argument the petitioner asked permission to reopen its case, and the motion being granted, additional evidence was introduced by petitioner, respondent sought to introduce evidence to sustain the issues on his part, but under the rulings of the court was unable to get in the evidence offered. Thereupon after argument the case was submitted and the court dismissed the petition and discharged the writ."

The following facts, as mentioned in the plaintiff's brief, appear in the record:

"In November, 1903, tenders for dredging sections 1 and 3 of

Honolulu harbor were called for and petitioner received both contracts as the lowest bidder. The first contract was performed and payments duly made and it is work done under the second contract which is now in question. Under that contract section 3 was to be dredged before March 31, 1904, and payments made at the rate of thirty-two cents a cubic yard, eighty per cent. of value of work done to be paid each month and the work to be finished ninety days after it was *begun*. After the completion of the first contract and before work was begun on the second, the superintendent of public works wrote (December 11, 1903) to petitioner that until further notice it would be necessary to limit the work to the sum of \$3,000, which he claimed was all the money available."

Pursuant to this notice the petitioner did nothing upon the work of dredging section 3 until after receipt of the following letter from the superintendent of October 27, 1904, namely:

"Confirming my conversation of yesterday with Mr. Walter F. Dillingham, I should like to have the work of dredging a portion of slip No. 1 between the Hackfeld and Oahu Railway & Land Company's wharves taken up immediately. The material to be taken out is contained in the strip 80 feet in width from the wharf to the center of the slip to a depth of 32 feet below mean low tide, for a length along the wharf sufficient to make up a total yardage of approximately 9,700 cubic yards.

"I am having further soundings and cross sections made, and this should be completed to-day, so that I can advise you definitely as to the length of the strip to be dredged.

"In connection with this work, I do not feel that it will affect your contract with the government to dredge section 3 of the Honolulu harbor where the estimate of material was 183,400 cubic yards, in case further appropriations are made by the legislature for carrying out this work."

October 31 the petitioner answered as follows:

"We have to acknowledge receipt of your letter of the 27th inst., and in which you express a desire to have the dredging of slip No. 1 between Hackfeld and Oahu Railway & Land Co's wharves taken up immediately.

"As the work suggested by your letter is included within the limits of dredging to be done by this company under agreement of contract dated the 3rd day of December, 1903, and designated as section No. 3 in Honolulu harbor, we hereby notify

you of our willingness to comply with your direction to proceed with the removal of the material up to the yardage indicated, to wit, 9,700 cubic yards, and when the work is completed, and payments made, the same will be regarded as a partial performance of said contract, the total of estimated material of which was 183,400 cubic yards."

The petitioner did the work mentioned in the above letter, and November 26, 1904, informed the respondent that it had done so in the following letter addressed to him, namely:

"This company, having completed the dredging of that part of section 3 of Honolulu harbor designated in your letter of October 27 last, we take this opportunity of informing you that we are prepared to continue the work of dredging said section 3 in accordance with the terms and conditions of our contract with you dated the 3rd day of December, 1903, and that work will be resumed on the 28th day of November, 1904.

"We note in your letter of October 27 a reference to further appropriations which may be made by the legislature for carrying on this work. We do not understand that there is any lack of appropriation to cover payment for the removal of the remaining yardage embraced in the estimate under our contract. In this respect allow us to call your attention to the fact that when our contract was signed there were ample appropriations in force, to wit: An item of fifty thousand (\$50,000) under act 10, and fifty thousand dollars (\$50,000) under act 18, and that a further item of seventy-five thousand (\$75,000) became available after January 1, 1904, by the passage of act 13, all of these laws having been enacted by the regular session of the legislature of 1903. We are not aware that these appropriations have been exhausted and they certainly have not expired, either by lapse of time or by the action of the special session of the legislature of 1904, for the reason that section 28 of act 39 of the Session Laws of 1898 makes provision for the continuance of appropriations where a contract has been made, by which a liability has been incurred, to issue or apply the same.

"The completion of the work covered by our contract for the dredging of section 3 above referred to, and the resulted payment of the amounts which would thereby become due, is of great importance to this company for the reason that large sums were expended in constructing suitable machinery and appli-

ances wherewith to do the work, the non-performance of which will cause a heavy loss to us. For this reason we propose to continue working under our contract, as intimated in the opening of this letter, being advised that a legal liability has been incurred by your department which will be enforced by the courts. We trust, however, that no recourse to the courts may be necessary and that you may, after a review of the situation, conclude to arrange for the payment of the amounts which may become due as the work progresses."

On November 29 the respondent wrote to the petitioner as follows:

"I have been given to understand that you are continuing the work of dredging section III of the Honolulu harbor without any authorization from me; and wish to state that this action is entirely at your own risk. I have already advised you of the amount of work to be done, and have your acknowledgment of the receipt of my letter."

On December 1 the petitioner writes:

"We would respectfully request a survey and estimate of the work performed by us under our dredging contract for section number 3 for the month of November."

To this last letter the respondent answered December 2, as follows:

"I am in receipt of your favor of the 1st inst., and in reply would say that not having authorized any work on the dredging of section III of Honolulu harbor, I do not understand the request for a survey and estimate of the work performed for the month of November."

As to the respondent's declaration in his letter to the petitioner above mentioned of December 11, 1903, that "referring to contract recently awarded for dredging section 3, Honolulu harbor, I will say that until further notice it will be necessary for you to keep within the expenditure of \$3,000 on this section," the petition avers that it "was in violation of said contract of the 3rd day of December, 1903, in which said respondent had agreed to make payments for the work done each month without restriction as to amount; that said restriction in expenditure rendered it impossible for the petitioner to

begin work on said section 3 without incurring heavy expense out of all proportion to the amount to be received for the work performed; that acting under the direction of said letter the petitioner at that time refrained from beginning the work of dredging said section 3." The transcript of testimony shows that prior to awarding the contracts the superintendent had told W. F. Dillingham, treasurer of the company, that owing to want of funds he hesitated about signing either one of the contracts, and that it was finally decided to make them, but that the contract for dredging section 1 was to be "put into effect first;" that by the time that was done funds might be available for carrying on the inner work comprised in the second contract, the respondent saying that then "we may see our way clear to go right ahead and put up more money to complete the inside." The effect of the letter of December 11, limiting the expenditure on section 3 to \$3,000, was taken by the petitioner, as Dillingham testified, "as judgment that we were not to start at that time," and the entire action on the second contract was thereupon postponed until the petitioner "should get an order." After completing section 1 the petitioner, by letter of May 6, 1904, informed the respondent that it had done so and was ready to start on section 3 and "waiting for your instructions before commencing," when the respondent said that he was "anxious to go ahead with the development of the harbor as he had been, but that they had no funds in hand with which to do the work, and that the governor was opposed to going on with the contract, as he believed the Federal Government could be induced to do the work." Dillingham asked the respondent to write him a letter in regard to not continuing the work at that time as he "did not want in any wise to jeopardize our (contract) by not going ahead with the work. In other words I wanted to make it clear to him that we were ready to go ahead with the work and that it was through no fault of ours that we did not continue, waiting instructions from him to do so, and I got a letter from him to that effect" dated June 4, 1904, reading as follows:

"I beg to advise you that it will be impossible to carry out the contract for dredging section 3 of the Honolulu harbor at the present time, as there are no funds available for this work."

The following correspondence occurred upon the subject of the petitioner's request of December 1 for a survey and respondent's answer of December 2 above mentioned: December 8 petitioner wrote to the respondent requesting an immediate survey to be made "or we shall be compelled to institute legal proceedings against you to enforce our rights under our contract with you dated December 3, A. D. 1903, for dredging section 3 of Honolulu harbor." December 10 respondent answered that he was under the impression that the assistant superintendent had furnished an estimate of the work in the Hackfeld slip which was authorized by the respondent, and that the respondent understood that the petitioner "desired a further estimate of additional work which I understand you are doing in this part of the harbor without instructions from me. For your information I would say that the total yardage taken out of the Hackfeld slip according to our survey was 8,588 cubic yards, and I should be glad to approve voucher covering payment for this work when same is submitted." Thereupon December 13 petitioner wrote, "You are quite right in your impression that our letter of the 1st inst. was a request for a survey and estimate of the work done in the month of November last, in addition to the 8,588 cubic yards above referred to, and we now, for a third time, request that such a survey and estimate be furnished us immediately." December 16 the respondent answered as follows: "It was my impression, when you requested an estimate of work done in November that you had not been advised by Mr. Howland that he had already figured up the yardage taken out of the Hackfeld slip, and I inferred that you referred to this work. While you are correct in stating that I had already approved a voucher for payment on the work done in the Hackfeld slip, this voucher has never been placed on file in the auditor's office, so that a warrant could be drawn, as I understand you did not care to accept it as it was

worded. As to an estimate of any additional work done in section 3, I have already advised you that this was not authorized, with the exception of the dredging of the Hackfeld slip, and I cannot therefore furnish you with any further estimate of work which you may have done."

The voucher referred to was the petitioner's bill dated November 23, 1904, on account of the "Appropriation dredging Honolulu harbor, contract of December 3, 1903, * * * To dredging section 3 of Honolulu harbor as per contract, 8,588 cu. yds., rate 32c, amount \$2,748.16," upon which voucher the assistant superintendent of public works had certified that "the above services have been faithfully performed; that the above has been received in good condition." This voucher was refused by the auditor because the contract of December 3 allowed only eighty per cent. to be paid for the work of each month and that the balance should be reserved until the contract was completed. Accordingly the word "final" was required by the auditor to be inserted in the bill before approving it. The petitioner declined to accept this form, considering that it would mean the loss of the whole contract, and thereupon this suit was brought.

OPINION OF THE COURT BY HARTWELL, J.

The case does not permit us to doubt the respondent's intention in asking the petitioner to dredge slip 1 of section 3. He did not intend that this work should be the beginning of the petitioner's contract which by its terms would have to be completed in ninety days thereafter, but that the slip alone should be dredged at a cost of about \$3,000, and that this should not affect the petitioner's contract to dredge the entire section "in case further appropriations are made by the legislature for carrying out this work."

It is true that the petitioner's October 31 letter expressing its willingness to do the work states the obvious fact that it was "within the limits of dredging to be done" under its contract,

adding "when the work is completed and the payments made the same will be regarded as a partial performance of said contract." If the petitioner meant by "partial performance" that dredging the estimated 9,700 cubic yards in slip 1 was a portion of the work of dredging the estimated 183,400 yards from the section, the remark would not mean that doing the work so requested was a beginning of the contract. The latter meaning, if intended, was directly opposed to the respondent's October 27 letter and to his evident and clearly expressed object from the beginning that the expense be kept down to \$3,000, and that nothing more be done until further appropriations were made. The \$3,000 worth of dredging in slip 1 could not lawfully have been contracted for by the respondent without advertising for competing bids, and was lawfully obtained by regarding the contract as in force and binding upon both parties as far as that work was done. We do not think that the petitioner was justified in the inference, whether made at the time of beginning the dredging of slip 1 or later, that the respondent meant that this work should be the beginning of the contract. The petitioner's right to begin and go on with the contract at any time after its date without awaiting notice from the respondent to begin it, or its duty resting upon an agreement, if any there was, to await such notice was not affected one way or another by the special engagement concerning slip 1. It is not claimed by the petitioner that work done in section 3, after completing slip 1, was expressly authorized by the respondent other than by making the contract.

And this brings us to consider whether the petitioner's contention is correct that the respondent had no right to delay the contract or to prescribe the time when the petitioner should begin to perform it, a contention based both on the claim that no agreement was made to that effect, and that if made the agreement, being oral, could not modify, enlarge or restrict the terms of the written agreement.

"The general rule is, that no verbal agreements between the parties to a written contract, made before or at the time of the

execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as varied by and merged in the written contract. But this rule does not apply to a subsequent oral agreement made on a new and valuable consideration, before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether." *Cummings v. Arnold*, 3 Metcalf 489, the court citing the rule laid down by Lord Denman in *Goss v. Lord Nugent*, 5 B. & Ad. 65: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary, or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."

In *Cooper v. Island Realty Co.*, 16 Haw. 92, it was held that in a suit for foreclosure of a mortgage the plaintiff could not show a contemporaneous parol contract that the mortgagor should pay taxes, but said, "This rule is subject to possible qualification, as in *Carr v. Dooley*, 119 Mass. 295, upon an offer to prove an independent agreement with reference to a distinct and separate matter, though founded upon a consideration embraced in the price of the land." In the case last cited the plaintiff had been obliged to pay an assessment for a sewer which was a lien on an estate which the defendant had conveyed to him by deed dated June 8, 1870, the assessment not having been made until after the deed was delivered, although the sewer was constructed under the provisions of a previous statute and in pursuance of a prior resolution of the mayor and aldermen. The action was brought on two counts; the first upon a covenant against encumbrances in the defendant's deed, and the second upon an alleged special promise to pay any assessment which should be made on account of the sewer then being built. The consideration of the promise was averred to be the purchase of the land, and the promise was sought to be proved by a conversation between the parties during negotiations for the purchase and while the sewer

was in process of construction in front of the premises, the defendant having then said to the plaintiff, "I will pay all that. You shall not be called upon to pay a cent for it." As to this evidence the court held: "Upon the question of its competency, it is sufficient that it has a tendency to prove an independent agreement made with reference to a distinct and separate matter, and founded upon a consideration embraced in the price of the land. The language relied on was indeed part of a conversation which took place while negotiations were pending which ended in a deed with limited covenants of warranty and against incumbrances, but it is not open to the objection that it is here used to vary or enlarge in any respect the contents of a written instrument, or that the promise proved is within the statute of frauds."

"It is hardly pretended by counsel for plaintiffs that it was not competent, after the written contract was made and signed by the parties, for them to make another verbal contract in regard to some parts of it, which to that extent should be a substitute for the first one. There is nothing in the nature of the contract itself requiring it to be in writing, nor is there any principle making it necessary that the new one should be reduced to writing because the first was written." *Teal v. Bilby*, 123 U. S. 578.

"It is not necessarily fatal that the evidence is parol which is relied on to show that the contract was not made as it purports on the face of the document to have been made. There was a time when a man was bound if his seal was affixed to an instrument by a stranger, and against his will. But the notion that one who has gone through certain forms of this sort, even in his own person, is bound always and unconditionally, gave way long ago to more delicate conceptions." *Goode v. Riley*, 153 Mass. 587.

Professor Thayer, in his valuable Treatise on Evidence, in an interesting discussion of the parol evidence rule (p. 409), says: "The true inquiry is, whether certain claims or defences be allowable. If relief can be had in such cases, the law of evidence has nothing to say as to any kind of evidence, good under its general rules, which may be offered to prove these things.

In so far as extrinsic facts are a legal basis of claim or defence, extrinsic evidence is good to prove them."

Clearly the law permits a party to a written contract to show that an oral agreement was made at the time when the contract was executed or subsequently, postponing the time of performance named in the contract, or to show that the contract was made on condition that the time of performing it should be postponed from the time named in the contract until the party for whom the service was to be performed should notify the other party to begin it, or until there should be available funds to pay for the work agreed upon.

We think that the facts shown by the evidence are that the respondent made both of the contracts with the petitioner with the mutual understanding that only the contract for dredging section 1 should be performed until there should be funds available for the payment of the work required by the other contract in dredging section 3, and should notify the petitioner to that effect; also that both parties acted in accordance with that understanding, until the dredging of slip 1 in section 3 came up for discussion, and that this was not intended by the respondent to affect the earlier understanding. In this view of the case the respondent was not required either to repudiate the contract or to notify the petitioner to begin it and cannot be compelled to recognize the petitioner's claim that it is entitled to perform the entire contract without notice from the respondent that funds are ready. It is true that if funds were not available for the contract the petitioner under this agreement would neither have the duty nor the right to perform it; and if the respondent was to determine whether funds, if available for the purpose, should or should not be used, the petitioner would practically be at his mercy, and the only value of the contract to the petitioner would be that if the dredging were done by the Territory at any time before March 31, 1904, or within any agreed extension of that period, the petitioner would have it to do, but taking the chance that in view of the possibility or fact of Congress appropriating money for the purpose the Territory

would not go to the expense. Either this was the mutual understanding or else the parties agreed upon a postponement of the contract for section 3 until there should be funds available for the purpose, whether the respondent should determine to use them or not. This, however, would be giving the agreement too restricted a meaning to accomplish the clearly expressed object of the respondent, to control the expenditure. It is evident that at some time after the contract was made, perhaps about the time when the work of dredging slip 1 was agreed upon, the petitioner had in mind and was advised by its attorneys that it could hold the superintendent to performance of the contract whether there was money in the treasury to pay for the work or not. We do not find that the respondent at any time assented to this view, or until the petitioner's November 26 letter that he knew of his claim. It could not have been expected that delaying the work from December 3, the date of the contract, until December 31, which would leave ninety days until March 31, would show material change in Territorial finances, and there is no evidence that since then there was money in the treasury to meet the expenditure required for dredging section 3.

We infer that the trial judge dismissed the writ because he found that there was an oral agreement that the performance of the contract should await the respondent's direction. On this ground we sustain the decree appealed from.

Kinney, McClanahan & Cooper and *S. H. Derby* for petitioner.

J. W. Cathcart for respondent.

AGNES C. GALT *v.* LULIA WAIANUHEA.

RESERVED QUESTIONS OF LAW FROM FIRST CIRCUIT COURT.

ARGUED MARCH 17, 1905.

DECIDED APRIL 14, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

LANDS.

Land in dispute held not included in Royal Patent Grant 1629.

CROWN LANDS—*adverse possession*.

Adverse possession of Crown Lands from 1873 to the present time cannot be shown.

EVIDENCE.

Proceedings on which Land Commission Award and Royal Patent Grant issued held not admissible in this case.

OPINION OF THE COURT BY WILDER, J.

This is an action of ejectment during the trial of which in the first circuit court certain questions were reserved for the consideration of this court. Plaintiff claims title in fee simple to the premises described in the complaint under Land Patent No. 4548. Defendant claims that this land patent is of no force because prior to its issuance the disputed land had already been granted to one Lorrin Andrews by Royal Patent Grant 1639, and she also claims title by adverse possession.

1. The first question reserved is as follows: Whether, under the evidence, the plaintiff has shown title in herself to the premises in controversy; that is to say, whether on all the records and papers introduced there was left a remnant which came to the Territory of Hawaii and by the patent of the government to the plaintiff, lying between the lands of Kaaha, of Holoua and of Andrews.

It appears that by the mahele of 1848 one Kaaha became entitled to claim $\frac{1}{2}$ of Kawananakoa, an ili in Honolulu, for which he subsequently received a Land Commission Award. One Holoua also received a Land Commission Award of a house lot in Kawananakoa out of the lands of Kaaha. The other $\frac{1}{2}$ of Kawananakoa was reserved or retained by the King by the act of June 7, 1848. The $\frac{1}{2}$ of Kawananakoa that Kaaha actually received by virtue of the Land Commission Award was less than one-half of this ili in area. The record does not disclose whether or not it was one-half in value. It is unnecessary to say whether this " $\frac{1}{2}$ " meant one-half in area, one-half in value, or the share that was actually taken by the different parties. The difference would be that, in the one case, the land not having been assigned would remain government land, and, in the other case, the land became a part of the so called crown lands. As the result is the same in either event, so far as these present proceedings are concerned, we assume that the land was a part of the so called crown lands.

The land in dispute is a small strip on Liliha street consisting of 6250 square feet and lying between the lands of Kaaha, Andrews and Holoua. It is not contended by defendant that this strip was included in either the award to Holoua or to Kaaha, but she does claim that it was included in Royal Patent Grant 1639 to Lorrin Andrews, and that consequently plaintiff has shown no title in herself. This grant was made in 1855. Whether or not this grant, purporting to be of government land, had the effect of conveying away land which belonged to the King as distinguished from the government, it is unnecessary to say, because we have come to the conclusion that it did not include the land in dispute.

That portion of the description in grant 1639 which defendant claims includes the land in dispute is as follows:

Pasture Land: Commencing at middle of stream, on makai edge of Wyllie road, the east corner of this land running

N. 50 $\frac{1}{2}$ ° W. 21 64-100 chs. along Wyllie road to foot of
pali; thence

adverse possession can be shown to crown land during any portion of said period.

On the assumption that the land in dispute was a part of the so called crown lands, this second question arises. By an instrument signed by the King, dated March 8, 1848, which was ratified by an act of the legislature of June 7, 1848, Kamehameha III retained (or reserved) certain lands, of which the land in dispute was a part, "to be the private lands of His Majesty, Kamehameha III, to have and to hold to himself, his heirs and successors forever." Revised Laws, pp. 1197-1201. From that time up to January 3, 1865, these reserved or retained lands were leased, mortgaged, sold and dealt with by the King and his successors in the same manner as the lands of any one else. See *Estate Kamehameha IV*, 2 Haw. 715; *Brown v. Spreckels*, 14 Haw. 399, 405. On January 3, 1865, an act to relieve the royal domain from encumbrances and to render the same inalienable was passed. The preamble and section 3 of this act were as follows: "WHEREAS, by the act entitled 'An act relating to the lands of His Majesty the King, and of the Government,' passed on the 7th day of June, A. D. 1848—it appears by the preamble, that His Most Gracious Majesty Kamehameha III, the King, after reserving certain lands to himself as his own private property, to surrender and make over unto his chiefs and people, the greater portion of his Royal Domain. And whereas, by the same act it was declared that certain lands therein named, shall be private lands of Kamehameha III, to have and to hold to himself, his heirs and successors forever; and that the said lands shall be regulated and disposed of according to his royal will and pleasure, subject only to the rights of tenants. And whereas, by the proper construction of the said statute the words 'Heirs and Successors,' mean the heirs and successors to the Royal Office. And whereas, the history of said lands shows that they were vested in the King for the purpose of maintaining the Royal State and Dignity; and it is therefore disadvantageous to the public interest, that the said lands should be alienated, or the said Royal Domain dimin-

ished. *And whereas, further*, during the two late reigns, the said Royal Domain has been greatly diminished, and is now charged with mortgages to secure considerable sums of money; now, therefore,

Be it enacted, by the King and the Legislative Assembly of the Hawaiian Islands, in the Legislature of the Kingdom assembled:

"Section 3. It is further enacted, that so many of the lands which by the Statute enacted on the 7th of June, 1848, are declared to be the private lands of His Majesty Kamehameha III, to have and to hold to himself, his heirs and successors forever, as may be at this time unalienated, and have descended to His Majesty Kamehameha V, shall be henceforth inalienable, and shall descend to the heirs and successors of the Hawaiian Crown forever; and it is further enacted, that it shall not be lawful hereafter to execute any lease or leases of the said lands, for any term of years to exceed thirty." Revised Laws, pp 1226-1227.

After the passage of this statute these lands became known as "crown lands."

Article 95 of the Constitution of 1894 provided as follows: "That portion of the public domain heretofore known as Crown Land is hereby declared to have been heretofore, and now to be, the property of the Hawaiian Government, and to be now free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues and profits thereof. It shall be subject to alienation and other uses as may be provided by law. All valid leases thereof now in existence are hereby confirmed."

After the promulgation of this Constitution it is not contended that the statute of limitations could run as against crown lands.

The statute of limitations as to land was not passed until 1870, although the principle of adverse possession running against land had been recognized by this court prior to that time. See Revised Laws, section 1988 and note.

Defendant contends, assuming that the land in dispute was a crown land remnant, that the case of *Harris v. Carter*, 6 Haw.

195, decided in 1877, finally decided that crown lands were subject to the statute of limitations, while plaintiff argues that the statement of Justice Judd in that case that crown lands were subject to the statute of limitations was a dictum, but, even if not so, either by virtue of the Constitution of 1864 or the act of January 3, 1865, or both, adverse possession could not run against crown lands.

The act of January 3, 1865, took the control of the crown lands out of the hands of the King and put it into the hands of crown land commissioners, and further provided that these lands "shall be henceforth inalienable," and this was done for the purpose, among other reasons, of "maintaining the royal state and dignity." No clearer language could be used to indicate that such lands should not and could not be disposed of. And what cannot be disposed of cannot be taken away by adverse possession. The same reasons for holding that statutes of limitation do not run against the state exist for holding that they do not run against crown lands under this statute, the income from which crown lands was devoted to governmental purposes, that is, to help maintain the dignity of the sovereign.

In *Gibson v. Choteau*, 13 Wall. 92, Mr. Justice Field says: "It is a matter of common knowledge that statutes of limitations do not run against the state. That no laches can be imputed to the King and that no time can bar his rights, was the maxim of the common law and was founded on the principle of public policy, that as he was occupied with the cares of government, he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public."

This quotation is cited with approval in *Kahoomana v. Moe-honua, Minister of the Interior*, 3 Haw. 635, 640.

Angell on Limitations at p. 31 says: "It is some times asserted, that the reason of the above maxim (*nullum tempus occurrit regi*) is, that the King is always busied for the public

good; and, therefore, has no leisure to assert his right within the time limited to subjects. The true reason it has been thought, however, is the great public policy of preserving the public rights, revenues and property from injury and loss by the negligence of public officers. And the prerogative right of the King in relation to acts of limitation in England is, in fact, nothing more than a reservation or exception, introduced for the public benefit, and is equally applicable to all governments."

Consent lies at the foundation of the doctrine of adverse possession. The proposition that title by adverse possession presumes a grant and that such presumption cannot be entertained against one incapable of granting (1 Cyc. 1113) was approved in *Kahoomana v. Moehonua, Minister of the Interior*, 3 Haw. 635, 640. If there never could have been an alienation of the crown lands after January 3, 1865, how could adverse possession run against those lands on the theory that there had been a grant of the same?

This statute of 1865 was assented to by all concerned, by the King, the one most interested, who signed it, by the legislature, which passed it, and by the people of these islands who have acted on it ever since up to the constitution of 1894, when the lands were formally declared to be government lands. Counsel for defendant in the oral argument of the case at bar, but not in their brief, questioned the constitutionality of this statute. So far as appears at present, we are inclined to believe that that statute was constitutional.

The foregoing views make it unnecessary to decide on the effect of the inviolability clause in the constitution of 1864. Whether or not the statement by Justice Judd in the case of *Harris v. Carter*, 6 Haw. 195, to the effect that in 1877 and prior thereto crown lands were subject to the statute of limitations, was required to be made upon the issues submitted in that case, it is also unnecessary to say, because this opinion does not accord with that statement. It should be stated, however, that the statute of January 3, 1865, above referred to, does not

appear to have been called to the attention of the court in that case.

The second question is answered in the negative, that is to say, evidence tending to show exclusive, open, notorious and continued possession of the land in dispute, on the part of the defendant, from the year 1873 to the present time, is not admissible.

3. The third reserved question is as follows: Whether the proceedings on which the Land Commission Awards and the Royal Patent, issued on the grant to Andrews, were based, are admissible for any purpose.

In connection with Royal Patent Grant 1639 to Lorrin Andrews, defendant offered in evidence a petition to the privy council dated August 28, 1854, a deed from Samuel Kulu-wailehua to Lorrin Andrews accompanying the petition, and also the minutes of the original survey and the order of the privy council dated August 28, 1854, making the grant; and in connection with Land Commission Award 1139 to Hooloua defendant offered in evidence the original proceedings on which said award was made. This testimony the trial judge refused to admit in evidence. It was offered on the theory that there was a latent ambiguity to explain. If such is the case it would be admissible. *Ookala Sugar Company v. Wilson*, 13 Haw. 127, 131. But, as there is no latent ambiguity, it is not admissible.

The answer to the third reserved question should be in the negative, that is to say, the proceedings on which the Land Commission Award and the Royal Patent were based are not admissible.

The case is remanded to the circuit court of the first circuit for further proceedings consistent with this opinion.

Ballou & Marx, attorneys for plaintiff.

Castle & Withington, attorneys for defendant.

TERRITORY OF HAWAII *v.* EDWARD S. BOYD.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 5, 1905.

DECIDED APRIL 14, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF WILDER, J.

EVIDENCE—*embezzlement.*

Upon a charge of embezzlement from the land office a witness for the prosecution on cross-examination testified that he was "then under indictments for embezzlement from the land office." On objection that the indictment was the best evidence defendant was not allowed further to ask the witness whether he knew "what period of time he was charged with having committed the embezzlement." When the evidence for the prosecution had closed the defendant called the clerk of the court to testify whether he had on his file indictments against the witness. Upon objection that the evidence was incompetent unless the defendant could show that there was an indictment "for this offense" the defendant said that his purpose was to "show that the witness was under indictment for the same offense at the same time, the abstraction of funds the same as the defendant here," meaning, as this court infers, the same class of offenses.

Held: The defendant was not prejudiced by the refusal of the court to allow the question, since a showing of the same time laid for the charges would not justify the inference that they were the same embezzlements.

The defendant on cross-examination identified an exhibit shown to him as in his own hand writing except a statement on the back of it, which was in the hand writing of his clerk, and testified that he thought he gave it to his clerk "as a code for a telegram between me and him." The writing on the back of the exhibit was a statement that the code was intended for the reason

that the defendant "is about to go to Hawaii, and if during his absence my books should be expeted I have to telegram to him as per directions." Held: There was no prejudicial error in the admission of the exhibit or in the refusal of the court to strike out the writing upon the back of it, which had no particular significance, being evidently the same explanation which the defendant himself gave of the inner portion of the exhibit.

The defendant had been interrogated on cross-examination concerning certain writings shown to him and subsequently marked for identification. Held: The refusal of the court to require the prosecution to file the writings in evidence was not error.

The verdict was justified by the evidence as the defendant by not claiming otherwise in his brief or argument tacitly admits.

Id.—*validity of Territorial enactments providing for a third judge of circuit court of first circuit.*

Held: The power impliedly granted by the Organic Act to the Territorial legislature to enact laws "concerning the several courts" and "relative to the judicial department" is broad enough to include the power to add one judge to the two judges of the first circuit court.

OPINION OF THE COURT BY HARTWELL, J.

The indictment on which the defendant was tried and convicted charges that on September 29, 1900, the defendant, being an officer of the Territory employed in the office of the commissioner of public lands, and by virtue of his office and employment being a public accountant charged with the duty of collecting and receiving revenue and other moneys on account of the Territory, and then and there entrusted with and having possession, control, custody and keeping by virtue of said office and employment of \$2,500, the money of the Territory, then and there feloniously did embezzle and fraudulently convert and dispose of said money to his own use and benefit without the consent and against the will of the Territory, the owner thereto entitled. Two other counts were in the indictment charging embezzlement of \$675 and of \$1,552.50 March 6, 1901. By order of the court upon defendant's motion the following bill of particulars was filed:

"First count. September 29, 1900, \$2,500 paid E. S. Boyd, sub-agent fifth land district, by Haiku Sugar Co. in payment of six months' rent, in advance, to March 30, 1901, under general lease number 475, water right, Maui.

"Second count. March 6, 1901, \$675 paid E. S. Boyd, sub-agent fifth land district, by Kaneohe Ranch Co. as rent on lease number 520, Kaluapuhi and Halekou from January 1, 1900, to July 1, 1901.

"Third count. March 6, 1901, \$1,552.50 paid E. S. Boyd, sub-agent fifth land district, by Hamakua Mill Co. in payment of rent on lease number 526, between Opihahala and Paauilo. from November 18, 1899, to May 18, 1901."

The defendant's bill of exceptions presents exceptions,

1. To the refusal of the court on objection by the attorney general to allow the clerk of the court, sworn as a witness for the defense, to answer the question, "Have you on your file indictments in the case of the Territory of Hawaii against Solomon Mahaulu?" meaning Stephen Mahaulu who had been a witness for the prosecution.

2. To the introduction in evidence by the prosecution on cross-examination of the defendant of Exhibit R, which, as stated in the defendant's brief, "was claimed to be a telegraphic code for use between the defendant and the witness Mahaulu and as such may be considered material evidence, but on the back of the document appears a memorandum made by Mahaulu unknown to the defendant."

3. To the denial of the defendant's motion to strike out from Exhibit R Mahaulu's memorandum, on the ground that it was the statement of another person than the defendant whose interpretation could not be binding upon the defendant.

4. To the denial of the defendant's motion that the prosecution place in evidence certain papers concerning which the defendant on cross-examination had been asked to make explanations, and which upon the request of the attorney general were marked for identification but were not offered or filed in evidence.

5. Exception to the verdict as contrary to the law and the evidence.

6. Exception to the denial of the defendant's motion in arrest on the following grounds, namely: (1) "That the act approved April 30, 1901, entitled 'An act to amend section 30 of chapter 57 of the Session Laws of 1892' is and was null and void. (2) That section 7 of the act approved April 22, 1903, entitled 'An act to amend chapter 57 of the Laws of 1892, entitled An act to reorganize the judiciary department,' etc., is and was contrary to section 81 of the Organic Act of the Territory of Hawaii, and therefore null and void. (3) That the conviction of the defendant by a court constituted of only one judge of the circuit court of the first circuit, to wit, Hon. W. J. Robinson, third judge thereof, was and is contrary to section 81 of said Organic Act."

7. To the denial of defendant's motion for new trial on the grounds that the verdict of the jury was against the law and the instructions and the weight of the evidence and for errors of law upon the trial in the court permitting the introduction of testimony objected and excepted to by the defendant, which objections and exceptions were noted by the stenographer.

Upon Exception 1 it is claimed by the prosecution that its witness Mahaulu could be discredited in no other way than is provided by section 1955, R. L., viz.: "A witness may be questioned as to whether he has been convicted of any indictable or other offense; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction." The statute does not cover this point. The law permits the discrediting of a witness by showing, either by cross-examining him or by any other competent evidence, that he is under indictment for the same offense, so that the only question here is whether in view of the admission made by the witness on his cross-examination that he was under indictments for embezzlement from the land office the court properly refused to allow the indictments against him to be shown by the clerk of the court. The transcript

shows that on cross-examination the witness Mahaulu was asked, "You are at present under indictments for embezzlement from the land office of funds?" to which the witness answered, "Yes sir." When the witness was further asked, "Do you know what period of time that you are charged with having committed the embezzlement?" the prosecution objecting that "the best evidence is the indictment," the objection was sustained. The further question, "Do you know with what you are charged in those indictments?" was ruled out on objection that it was not the best evidence. It appears further that the objection made by the prosecution to the question asked of the clerk concerning indictments on file against Mahaulu was that the evidence was "incompetent, irrelevant and immaterial unless defendant can show there was an indictment against Mr. Mahaulu for this offense." To the question asked by the court, "What is the purpose of the question?" the defendant's attorney answered, "The purpose of the question is to show that Stephen Mahaulu is under indictment for the same offense at the same time, the abstraction of funds the same as the defendant here," by which we infer that he meant the same class of offenses. The indictments were evidence of their contents, but the witness sought to be impeached by showing them had admitted in cross-examination everything which his attorney sought to show by the indictments, except that they charged the embezzling by the witness as having been done at the same time in which the defendant was charged with embezzling.

We do not consider that the defendant was prejudiced by not showing that the time laid for the witness' embezzlement was the same as that laid for his own, having already shown that the two were under indictment for embezzling from the same office, since a showing that the same time was laid for the charges would not justify the inference that they were the same embezzlements.

As to Exceptions 2 and 3 relating to Exhibit R, the inner portion of the exhibit is as follows:

"Intention	Telegram.
Should auditor come in to check, and if no questions asked everything O. K.	Received mail—no reply required.
If checking satisfactory.	Received mail—will reply.
If anything turns up and they doubt your explanation.	Received mail—reply unnecessary."

The back of the exhibit contained the following:

"This is intended for this reason. Mr. Boyd is about to go to Hawaii and if during his absence my books should be experted I have to telegram to him as per directions."

When the exhibit was shown to the defendant on cross-examination he was asked if he had ever seen it before or had written any part of it. His answer was "Yes sir, I received—I did this." The objection first made by the defendant to its admission was that all the writing had not been submitted to the witness, whereupon the prosecution asked him, "Didn't you see the whole thing, Mr. Boyd, both sides?" Answer, "Yes, I seen it." It was then received in evidence, defendant objecting to it solely on the ground that it was "not in any way connected with this case; * * * neither addressed to anybody nor dated." The court then recalled its ruling and the defendant was asked, "When was that given, written out by you?" to which he answered that he thought it was before the extra session of the senate, between March, 1901, and the fall of 1902. The defendant then objected that the paper "had no connection with this specific case; * * * no reference made there to the counts charged in this bill of particulars, and it is not even shown that they occurred during the period." The defendant then testified, "I think I gave that to Mr. Mahaulu as a code for a telegram between me and him" when the defendant was commissioner of public lands and Mahaulu was his chief clerk. He identified the inner writing as his own and the writing on the back as Mahaulu's, whereupon the exhibit was admitted in evidence, and the defendant's motion that the last portion be struck out was refused. The writing on the back of the exhibit in the hand-writing of Mahaulu, as testified by the defendant, has no

particular significance, being evidently the same explanation which the defendant himself gave of the inner portion of the exhibit, namely, a private code for telegraphing between the two. We see no prejudicial error in the admission of the exhibit or in the refusal of the court to strike out the writing upon the back of it.

In order to sustain Exception 4 it would be necessary to hold that a witness for the defendant cannot be cross-examined concerning writings which are shown to him and subsequently marked for identification unless they are filed and made evidence. The law does not require this to be done. If the witness deny knowledge of the writings or otherwise fail to prove them they do not, by reason of his testimony, become evidence. Whether he admits or denies his previous knowledge of them, or that they are genuine wholly or in part, or otherwise testifies concerning them, he can be re-examined upon his testimony without making the writings his own further than he had already done in cross-examination.

No errors have been found in the rulings at the trial. The verdict was justified by the evidence as the defendant, by not claiming otherwise in his brief or argument tacitly admits. Therefore we cannot sustain Exception 5 to the verdict as contrary to law and evidence.

Exception 6 is based on the claim that the third judge of the circuit court of the first circuit is an unconstitutional judge, and that Act 19, Session Laws of 1901, and section 7 of Act 32, Session Laws of 1903, are invalid, the former amending section 30, chapter 57 of the Session Laws of 1892, by enacting that "the circuit court of the first circuit shall consist of three judges" (instead of two judges as formerly), "who shall be styled first, second and third judges respectively of the circuit court of the first circuit, either of whom may hold the court," and the latter act further amending said section 30 as amended by said Act 19 by enacting, "There may be one or more sessions of the court at the same time, and each session may be held by one but not more than one of the judges. The judg-

ments, orders and proceedings of any session held by any one of the judges, shall be as effective as if only one session were held at a time." The contention of the defendant is that the Territorial legislature has no power under the Organic Act "to make provisions for the establishment, organization or modification of the courts established" by the Organic Act, which in section 81 provides that the "judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish." This language, says the defendant, "is evidently modeled upon article 3, section 1 of the Constitution of the United States, by which it is provided that 'the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish.'" To sustain this view the defendant cites *U. S. v. Union Pac. R. R. Co.*, 98 U. S. 569, 603, in which the court said: "With the exception of the supreme court the authority of Congress in creating courts and conferring on them all or much or little of the judicial power vested in the United States is unlimited by the Constitution" meaning, as counsel contend, that "where the Constitution itself establishes a court, the legislature of the nation could make no provision inconsistent with the provisions of the Constitution relating to such court." In view of the importance of the question we quote fully from the defendant's brief on the subject, viz.:

"In the Organic Act, however, the details of organization of the courts established by the act, and specially named therein, were not committed to the legislature of Hawaii, but the existing courts of the Republic of Hawaii were adopted by said act, except that the number of circuit judges outside of the first circuit was increased. While, therefore, Congress was by the Constitution given unlimited power to ordain and establish any courts which, in its wisdom it might deem necessary, subject only to the provision that there must be a supreme court, the Organic Act gives similar unlimited power to the Territorial legislature to establish all courts which it may deem necessary, provided that there must be a supreme court and circuit courts. In the former case the Constitution itself ordained and estab-

lished the supreme court; in the latter case the Organic Act itself ordains and establishes a supreme court and circuit courts.

"It goes without saying that only the power which establishes has the right to modify. Otherwise a tribunal established by competent authority becomes, from the instant of its creation subject not to that authority but to the authority of another or an inferior power. If the Territory of Hawaii can change the organization of the circuit court, as established by Congress in adopting the existing judicial machinery of the former Republic, by providing one additional judge, it has of course the right to provide a hundred additional judges. * * *

"A *reductio ad absurdum* arises if the power of the legislature to add to the number of judges be admitted, in that the correlative power must also be conceded to exist of reducing the number of judges, whereby a judicial officer appointed by the President and confirmed by the senate of the United States would be legislated out of office by the Territorial legislature."

The Organic Act in requiring the Federal court "to consist of one judge," that "the supreme court shall consist of a chief justice and two associate justices" and that "the President shall nominate and by and with the advice and consent of the senate appoint the chief justice and justices of the supreme court" (and) "the judges of the circuit courts" would not permit the legislature to increase or lessen the number of the justices of the supreme or Federal court. It is certainly subject to this limitation that section 81 of the Organic Act implies that the legislature may enact laws otherwise than was provided by the laws of Hawaii theretofore in force "concerning the several courts and their jurisdiction and procedure." The implied meaning of the provision that "the laws of Hawaii relative to the judicial department, including civil and criminal procedure except as amended by this act are continued in force subject to modification by Congress or the legislature" is that the legislature may modify those laws in some respects which do not change the numbers of the justices of the supreme and Federal courts. The power to enact laws "concerning the several courts" and "relative to the judicial department" is broad enough, as we think, to include the power to add one judge to the two judges of the first circuit. This does not necessarily imply a power to

lessen the number of judges or to repeal the laws by which the circuit courts existed. If the legislature should by enactment prescribe more circuit judges than in the opinion either of the President or the senate were appropriate or requisite for the needs of the Territory, such enactments would readily be nullified either by a failure or refusal of the President to appoint or of the senate to confirm the appointments, if not also by a failure of Congress to appropriate money for their salaries. As far as the validity of the appointment of the third judge of the first circuit is concerned, we coincide in the opinion of Attorney General Knox upon this very question (23 Ops., 544), that "Congress has in fact authorized the legislature to increase the number of judges."

Exceptions overruled.

Attorney General Andrews for prosecution.

A. G. M. Robertson for defendant.

MELEAKA HOW ON AND HOW ON v. AMOE AH HO
AND TONG JUNG, alias YEE SUNG.

EXCEPTIONS FROM CIRCUIT COURT, SECOND CIRCUIT.

ARGUED APRIL 3, 1905.

DECIDED APRIL 18, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EJECTMENT—*verdict*.

In ejectment claiming right to possession of land and damages the following verdict was rendered: "We the jury in the above entitled cause find for the plaintiff in the sum of one dollar damages." Held, that the verdict, which was deficient in not expressly finding one of the issues in the case, may be aided by the pleadings, instructions and exhibits, so as to supply by intendment that which was not expressed in it, but which neces-

sarily followed from that which was expressed, viewed in connection with the pleadings, instructions and exhibits, and should be construed in this case to mean a verdict for plaintiff for the land described in the complaint and one dollar damages.

OPINION OF THE COURT BY WILDER, J.

This is an action of ejectment in which plaintiffs claimed a piece of land in Lahaina and damages for its detention. Defendants filed a general denial. The jury returned a verdict in the following form: "We, the jury in the above entitled cause, find for the plaintiff in the sum of one dollar damages." Thereafter defendants filed a motion for a new trial on the following grounds, to wit:

1. That said verdict does not conform and respond to the issues of fact submitted by the pleadings in said case, but, to the contrary, fails to comprehend all of the issues raised by said pleadings;

2. That said verdict is irregular and defective in that it does not determine the issue of ownership and legal title to the property in controversy in said action, and which issue is raised by the pleadings;

3. That said verdict is irregular and fatally defective in that it does not determine and settle the issue of right of possession to the land in controversy in said action, and which issue is raised by the pleadings;

4. That said verdict is irregular and fatally defective in that it does not specify any estate whatever upon which judgment can be rendered.

Although the motion for new trial was based in part on the stenographer's notes and clerk's minutes, they are not included in the record sent up to this court, and, so far as this court is concerned, no objection was made by either side to the form of the verdict at the time it was rendered. The motion for a new trial was granted by the trial court, and the case comes to this court on plaintiffs' exception to such ruling.

The sole point is, did the verdict sufficiently respond to the

issues. There were but two issues submitted to the jury, namely, (1) right to possession of the land, and (2) damages for its detention. The second issue was dependent upon the first one and could only be passed on in case the first issue was found in favor of the plaintiffs.

It is true that the verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue, but it is also true that a verdict will be held sufficient if the court can ascertain what was found and it is in substance responsive to the issue tried. Verdicts should be liberally construed.

In *A. T. & O. R. R. Co. v. Purifoy*, 95 N. C. 302, which was an action to set up a lost deed, the jury found that the defendant did not execute a deed for any part of the land but did not specifically find that no deed was ever executed, the court interpreting the verdict in connection with the issue submitted.

In *M'Murray v. Oneal*, 1 Call. (Va.) 246, referred to in Sedgwick & Wait on Trial of Title to Land, Sec. 498, a verdict in ejectment, "For the plaintiff one cent damage," was extended by the court, and made to read, "We of the jury find for the plaintiff the lands in the declaration mentioned and one cent damage."

In *Keshner v. Keshner*, 36 Md. 309, also referred to in Sedgwick & Wait, Sec. 498, it appeared that the jury found a verdict "for the plaintiff, and assessed the damages at one cent." The court held that the plain meaning and import of this verdict was that the defendants were guilty of the trespass and ejectment complained of in the declaration, and that the jury assessed the damages resulting therefrom to the plaintiff to be one cent.

The case of *Pearce v. Bell*, 21 Tex. 688, is in point. That was a suit for debt and foreclosure of mortgage. The issues were, first, the existence of the mortgage, and, second, the amount due under the mortgage. The jury returned the following verdict: "We, of the jury, find for the plaintiff the sum of \$1,573." The court said: "This finding of the jury

under the issue could not possibly have been arrived at without also finding that the mortgage had been executed." It was very much like the case at bar where the jury could not possibly have passed upon the second issue, namely, that of damages, in favor of the plaintiff, unless they also found in favor of the plaintiff on the first issue, namely, right to possession of the land. It was held in that case that the verdict, which was deficient in not expressly finding one of the issues in the case, could be aided by the pleadings so as to supply by intendment that which was not expressed in it but which necessarily followed from that which was expressed, viewed in connection with the pleadings. See also *Turner v. Koontz*, 138 Ind. 252.

Applying this principle to the facts in the case at bar, it will be seen that by the pleadings there were two issues submitted, the first, one of right to possession, and the second, one of damages, which was dependent on the first. The record further discloses from the instructions given to the jury that it was made clear to them what the issues were, and that they could not possibly find damages for plaintiffs without also finding the right to possession of the land to be in plaintiffs. Of defendants' eight instructions seven of them had reference to the right to possession of the land, the other one being as to the preponderance of the testimony. Eleven instructions were given to the jury on behalf of plaintiffs, ten of them dealing with the question of the right to possession of the land, and the eleventh distinctly charging the jury that if they found for the plaintiffs on the question of the right to possession of the land then they should award the proper damages. That the instructions may be considered in this court in order to aid the verdict, see *Bennett v. Butterworth*, 52 U. S. 669. It is clear, not only from the pleadings and testimony, but also from the instructions, that the jury intended to, and in effect did, find for the plaintiffs on both of the issues submitted.

Kekaua v. Kalei, 3 Haw. 683, 713, was an ejectment case in which the jury rendered a verdict in Hawaiian, which, when translated, reads as follows: "We, the jurors, have decided

unanimously in favor of the plaintiff; and we do not believe that a proper deed was made between Kanepuaa and Pupuka, the parties owning the land, and Kaluahi, the father of the defendant." At the time of the rendition of the verdict the foreman of the jury stated that they did not believe the witness Keliikanakaole, whose evidence had been adduced to interrupt the defendants' prescription. The court said, on page 684, that the form of the verdict was not objected to at the time of its rendition and "did not need correction." Defendants assigned error in that the jury erred in returning a verdict for the plaintiffs on the ground that they found that the deed under which the defendants claimed was not a good one, and in that the jury by their verdict did not express any conclusion upon the evidence supporting or opposing the title by prescription, also set up by the defendants. The verdict was upheld and the court said, on page 714, that "It is apparent from the record that the jury did not sustain the deed of the defendants, and as they found for the plaintiffs, it must be inferred that they found as proven all the facts necessary to make out the plaintiffs' case, and that they did not find the prescription of the defendants as proven, in spite of their disbelieving the witness Keliikanakaole."

The formal defect in the verdict in the case at bar undoubtedly could and would have been removed at the time of the rendition of the verdict and before the jury were discharged, had the matter been called to the attention of the trial court. We think that justice requires that this verdict be upheld.

The exception is sustained and the case is remanded to the circuit court of the second circuit with instructions to enter up judgment for plaintiffs for the land described in the complaint and one dollar damages.

C. W. Ashford for plaintiffs.

James L. Coke and *D. H. Case* for defendants.

KEE KAN, NG LAI, NG YEE, KONG YEE, KONG LUNG, LOY HOCK LOCK AND CHEN WAI, PARTNERS UNDER THE NAME OF KWONG LEE YUEN & CO., *v.* THE ALLIANCE ASSURANCE COMPANY OF LONDON.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 4, 1905.

DECIDED APRIL 18, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE LINDSAY IN
PLACE OF WILDER, J.

The board of health ordered destroyed by fire as infected by plague all the buildings in a particular portion of a certain block. The fire department, which was requested to execute the order, first burned three buildings in the middle of the block outside of but near the condemned area. This fire spread accidentally not only to the condemned buildings but to others in the same block and from building to building and block to block until it reached the building covered by the policy of insurance upon which this action was brought. The policy excepted losses caused "by order of any civil authority." There was evidence tending to show that the three outside buildings were burned for the purpose of making room for the firemen to work in or to prevent the spread of the fire when the condemned buildings should be burned, or by mistake under the impression that these buildings were covered by the order of the board of health; also that the spread of the fire was due to a wind, claimed to be extraordinary, which arose after the fire was started. Held,

FIRE INSURANCE—loss caused by order of civil authority.

The fire should be regarded as caused by the order of the board of health, though started in buildings outside of but near the condemned area, if it was so started for the purpose of preventing a spread of the fire from such area to other uncondemned buildings and was reasonably necessary or reasonably supposed to be nec-

essary for that purpose, but not if, though done in good faith, it was so started by mistake or merely to make room for convenience to work in when burning the condemned buildings. A new trial is ordered for erroneous instructions upon these points.

INSTRUCTIONS—*inapplicable.*

It is not error to refuse instructions that are inapplicable to the evidence, as, for instance, instructions based on the theory that the fire might have been started in the buildings outside the condemned area on the belief that those buildings would soon be condemned, there being no evidence tending to show that the fire was started on that belief.

EVIDENCE—*minutes of board of health.*

A statement of certain proceedings of the board of health is admissible as minutes of a meeting of the board to show the resolution of the board condemning the buildings and ordering their destruction by fire, although such statement is not headed "minutes of a meeting of the board" as other minutes in the same volume are, and although the volume contains some other matter than minutes of meetings of the board, it appearing otherwise that such statement was the minutes of a meeting of the board.

Such minutes are admissible also in the present case although the meeting was a special one called for a purpose other than that in question—whether they would be admissible or not in a proceeding between the board and one affected by its action. There was also evidence tending to show that all the members of the board were present at the meeting, in which case no question as to notice to absent members could arise.

BURDEN OF PROOF—*distinguished from burden of producing further evidence.*

The burden of proof rests upon the party who is required to ultimately establish his case by a preponderance of evidence in a civil case and does not shift. The burden or duty of going forward with the evidence may shift according as presumptions that have to be met by the opposite party are raised by the evidence of either party, but all that is necessary to sustain such burden or duty is to introduce sufficient evidence to balance the evidence which it is intended to meet and so bring the evidence on both sides into equilibrium.

OPINION OF THE COURT BY FREAR, C.J.

This is an action for \$750 upon a policy of fire insurance issued by the defendant upon the plaintiffs' building situated

on the northerly side of King street between Maunakea and Kekaulike streets in Honolulu. It is one of the so-called Chinatown fire cases, a number of which have come before this court during the last five years. The one most similar to this—so similar that most of the statements both of law and of fact in that are applicable to this case—is that of the present plaintiffs against *The Manchester Fire Assurance Co.*, 15 Haw. 704.

On January 19, 1900, the board of health condemned and ordered to be destroyed by fire as infected by bubonic plague all the buildings on the Waikiki side of a line drawn along that (the Waikiki) side of the Kaumakapili Church premises and extended through the block, in what is known as Block 15, bounded by Nuuanu, Beretania, River and Kukui streets. The fire commissioner to whom the order was addressed passed it on to the chief engineer of the fire department, who proceeded to carry it out on the following day. Before burning the buildings covered by the order, however, he burned three buildings in the same block outside of the condemned area on the Ewa side of the line above mentioned and immediately in the rear of the Kaumakapili Church premises. From these buildings the fire spread accidentally not only to the condemned buildings but to Kaumakapili Church and the buildings on the other side in the same block and then from building to building and block to block until it reached the building covered by the policy in question.

The plaintiffs proved the policy and the loss or destruction of the building by fire. The defendant then, with a view to showing that the loss was one excepted by the terms of the policy, namely, a loss caused "by order of any civil authority," introduced evidence tending to prove the order of the board of health and that the fire was started in pursuance or as a result of that order. The plaintiffs in rebuttal then attempted to show that the loss was not caused by the order of the board by showing (1) that the fire was started outside of the condemned limits and in a building or buildings not covered by the order of the board and not reasonably required to be burned in order to

execute the order of the board or prevent the spread of fire from the condemned buildings to other buildings and (2) that after the fire was started it spread to the building covered by the policy through the intervention of an independent self-operating efficient cause, namely, an extraordinary wind that arose after the fire was started. It is in connection with the first of these attempted showings of the plaintiffs that the principal questions in the case arise, and for erroneous rulings by the trial judge in regard to which a new trial must be ordered.

In the case above cited the plaintiffs took the position that the mere fact that the fire was started outside of the condemned area was sufficient to show that it was not caused by the order of the board of health, but the court took a different view and held that, under certain circumstances at least, the fire might have been caused by order of the board even though it was started outside of the limits of the condemned area, as, for instance, if the burning of the three buildings outside of that area was reasonably necessary or reasonably supposed by the chief engineer to be necessary to prevent the spread of the fire to other buildings that had not been condemned. The plaintiffs now, conceding the correctness of that conclusion, contend that the court did not in that case go any further, and should not now go any further, than to hold that the burning of the outside buildings should be considered as caused by the order of the board only in case the burning was reasonably necessary or reasonably supposed to be necessary to prevent the spread of the fire to other buildings not ordered to be burned. The defendant, on the other hand, contends that the former decision went so far, and that the court should now go so far, as to hold that the burning of the outside buildings was caused by the order of the board if the chief engineer acted in good faith in burning them, whatever actuated him, as, for instance, even if, as the plaintiffs contend, he burned them under the erroneous impression that they were within the condemned area or that the order of the board included the entire block in which these buildings were situated or if he burned them merely for the purpose of

making room for convenience in burning the condemned buildings. In our opinion the plaintiffs' contention in this respect must be sustained.

The court did not attempt in the former case to state exhaustively the circumstances under which the burning of the outside buildings might or might not be considered as caused by the order of the board. For instance, it stated that, if the chief engineer set fire to these buildings not in execution of the order received but to gratify ill will, the order would not be regarded as the cause of the fire, but it did not hold conversely that anything whatever short of that would make the order the cause of the fire. It held that at least one thing short of that, namely, reasonable necessity, would produce that result. Again, it expressly declined to state what the result would be if these buildings were burned by mistake on the supposition that they were within the designated area. It did not even state that the order of the board would be regarded as the cause of the fire if the burning of these buildings was reasonably necessary to execute the order aside from the question whether that was reasonably necessary to prevent the spread of the fire to other buildings. The reasonable necessity that was held sufficient to bring the fire under the order of the board was stated with reference to either the spread of fire alone or the execution of the order and the spread of the fire at the same time conjunctively. Theoretically it might be sufficient if the burning of these buildings was reasonably necessary for the execution of the order irrespective of preventing a spread of the fire, although it is difficult to conceive how there could have been such a necessity in the present case.

If the buildings outside the condemned area were burned by mistake on the supposition that they were within the portion of the block that had been condemned or that the entire block had been condemned and ordered burned, the fire could not be regarded as caused by the order. The order in such case would be merely an occasion, not the cause of the fire. It would not be a *causa causans* that rendered that fire necessary, nor would that

fire be *ex justa causa* with reference to the order of the board. There was no order to burn those buildings. The chief engineer in burning them was not acting under the direct supervision of the board. He was in a sense in the position of an independent contractor, in which case the doctrine of *respondeat superior* would not apply as to acts wrongfully done by him not within the scope of his orders in an action against his superior if his superior were suable in tort, although, as stated in the former case, the law of torts is not altogether applicable in an action of contract against a third party, an insurance company. It is not sufficient that the fire would not have been started but for the order of the board. It must have been within the scope of the order or rendered reasonably necessary by the order. Likewise, if the burning of these buildings was merely for the purpose of making room as a matter of convenience for burning the condemned buildings, the burning could not be regarded as caused by the order of the board, there being no reasonable necessity for that. It may be that the burning of these buildings for the purpose of making room might be brought under the order of the board if it was done for the purpose of controlling the burning of the condemned buildings so as to prevent the spread of fire, if that was reasonably necessary, as distinguished from the prevention of a spread of fire from the condemned buildings to other buildings through these buildings as a medium, but not, as already stated, if it was done merely for the purpose of making room as a matter of convenience in order to burn the condemned buildings, there being no reasonable necessity for that. It makes a difference whether the burning of these buildings was a means to an end or the end itself, and, if a means, what the end was for which it was a means.

The principal exceptions involving these questions are those numbered 6, 8 and 9. Exception 6 was taken to the giving of defendant's requested instruction 18, which was as follows:

"If you believe from the evidence that the chief engineer of the fire department started the fire in a building outside of the boundary line laid down in the order of the board of health in good faith with a view to prevent the spread of fire, or for the

purpose of making room for the firemen to work in, in executing the order, I charge you that the order of the board of health should still be regarded as the proximate cause of plaintiffs' loss and your verdict should be for the defendant, unless you find from the evidence that the spread of fire was caused by an unusual and extraordinary wind."

The objection to this is that it makes good faith alone sufficient, even though the burning of these buildings was merely with a view to prevent the spread of the fire, whether it was reasonably necessary or reasonably supposed to be necessary for that purpose or not, and, worse still, even though it was merely for the purpose of making room for the firemen to work in in executing the order irrespective of the purpose of preventing the spread of the fire by enabling the firemen to control it and irrespective of whether the making of room for any purpose was reasonably necessary or reasonably supposed to be necessary or not.

Exceptions 8 and 9 relate to the question of mistake—exception 8 being to an instruction to the jury that there was no evidence of a mistake and that the jury should disregard the argument of plaintiffs' counsel upon that point; exception 9 being to the refusal to give the plaintiffs' requested instruction to the effect that if the chief started the fire in the outside buildings by mistake the fire was not caused by the order of the board. In view of what has already been said it will be unnecessary here to do more than point out that there was evidence to go to the jury on the question of mistake. It was undisputed that the buildings were in fact outside of the condemned area; one witness, the engineer and foreman of one of the fire engines, testified that they went out that morning to burn Block 15, that that was the order he got from the chief, that the chief came down the afternoon before and told him that they were going to burn Block 15 and would first burn the Waikiki half of it and that they had orders to burn Block 15 and that they had decided to start right back of Kaumakapili Church and burn out those buildings first, and that the common way of working at previous similar fires had been to go into the center of a con-

demned area and burn out a few buildings there to get room to work in and then work from that in different directions; another witness, then the senior foreman, now the chief, testified that on that afternoon the chief and he rode entirely around the block looking at it and that the chief had said that the next day they were going to burn down half of it and that he intended to burn this portion first and start at the L shaped building (one of the three outside buildings) and burn right over to Nuuanu street. This it seems to us was sufficient to go to the jury on the question of mistake. It is not for us to say how much weight should be attached to it, but in this connection it may be said that the chief engineer at that time, the one man who could state definitely the object of burning the outside buildings, had died before the trial and that it was difficult to get conclusive or strong evidence to support any theory. The evidence in support of the theories of the defendant itself is not altogether convincing, to say the least; indeed, the plaintiffs go so far as to contend that the verdict should be set aside on the ground that there was no substantial evidence to support the defendant's theories.

While not strictly necessary for present purposes, since a new trial must be ordered upon the exceptions already considered, we will nevertheless pass briefly upon the questions presented by several other exceptions, with a view to preventing them from arising again on the new trial.

Exceptions 10 and 11 were taken to the refusal of the court to give plaintiffs' requested instructions 5 and 6, to the effect that if the chief of the fire department started the fire in the buildings outside of the condemned area, knowing that such buildings were not covered by the order of the board of health, or not knowing whether they were so covered or not but disregarding or neglecting to examine carefully or follow the terms of the order, and acting on his general belief that such buildings would be condemned and ordered to be burned in the near future, if not already condemned, then the fire was not caused by the order of the board. We find no error in refusing these

instructions. There was no evidence to which they were applicable unless on the view that it was a matter of pure guesswork for the jury to say why the fire was started outside the condemned area and that the jury might as well have guessed that it was because the chief thought these buildings would be condemned as made any other guess. There were several other theories, each of which was far more reasonable and supported by more or less definite evidence.

Exceptions 1 to 5 inclusive relate to the admissibility of what were introduced as minutes of the board of health for the purpose of proving the resolution of the board condemning the buildings within the area above described and ordering their destruction by fire. It was held in *Ahana v. Ins. Co. of North America*, 15 Hāw. 638, that these minutes were admissible in evidence and there is no occasion to go over that ground again. It is contended, however, that certain objections are made now to the admissibility of these minutes that were not made in that case. For instance, it is contended that the book containing the minutes of the board contained some other matters also, as, for instance, a note at the bottom of page 189, which the trial court excluded as not being a part of the minutes. It is contended that the so-called minutes of the meeting at which the resolution in question was adopted and which are set forth on pages 145 to 159 inclusive are of the same character and more particularly because these minutes are not headed substantially in the form "Minutes of a meeting of the board of health," as is the case with other minutes in the volume, and because in the minutes of a subsequent meeting found on page 377, which contain an approval of the condemnation proceedings in question and of minutes of other meetings covering a period of several months, the board itself distinguished between minutes of such other meetings and the condemnation proceedings, thus indicating, as it is contended, that the board itself did not consider the statement of the condemnation proceedings as minutes of a meeting of the board. In our opinion the statement of the condemnation proceedings were minutes

of a meeting of the board and were so considered by the board itself. No particular form is prescribed for minutes of meetings of the board: The statement in question purports on its face to be minutes of a meeting of the board. It opens with a statement that the board "met" at a certain time and place pursuant to a resolution passed at "yesterday's meeting." The proceedings are then set forth in a formal way showing motions made, seconded and acted upon. The statement then closes with "The meeting then adjourned" to meet at a certain time and place. The approval by the board of these proceedings at the subsequent meeting was an approval not merely of the "condemnation proceedings" but of the "minutes of the condemnation proceedings."

It is further objected to these minutes that the meeting in question was a special meeting held in pursuance of a resolution passed the day before to visit Block 10 and that it does not appear that any notice was given to absent members of the board, who might have been interested in Block 15, now in question, and other blocks that were acted upon at that meeting. This objection was practically passed upon in the *Ahana* case above cited, for there one of the objections was, not indeed that no notice was given to absent members as to other blocks than Block 10, but that no notice of this special meeting was given to such members at all. It was held that whatever might be the conclusion in a proceeding as between the board and one affected by its action the minutes were admissible in an action like the present. It may be added that there was evidence tending to show that this was a full meeting of the board, in which case, all the members being present, no special notice was required.

Exception 7 was taken to the giving of defendant's requested instruction 20, as follows:

"The burden of proving with a preponderance of evidence that an unusual and extraordinary wind intervened and caused the spread of fire is upon the plaintiffs. Unless this burden has been sustained by the plaintiffs, you will find the fact against their contention."

This instruction was perhaps technically erroneous as a proposition of law, assuming that there was evidence to which it was applicable, though it is doubtful whether it could have been prejudicial to the defendant. It involves the distinction between the burden of proof or the burden of the issue in the sense of ultimately establishing the case of the party upon whom such burden rests and the burden or duty of going forward with the evidence. The burden of proof does not shift but the burden of producing further evidence may shift. The burden of proof rests upon the real "actor, who has to bring his proof to the required height and carry his case beyond an equilibrium of proof, or beyond all reasonable doubt, as the case may be," and who may be the plaintiff or the defendant according to the circumstances. In the present case, assuming that the defendant adduced sufficient evidence to raise a presumption that the fire was caused by the order of the board of health, the burden or duty was then cast on the plaintiffs to introduce evidence to rebut that presumption, but all that was necessary was to introduce sufficient evidence to meet or balance the defendant's evidence and produce an equilibrium. It was unnecessary to produce a preponderance of evidence upon that point in order to be entitled to judgment, for, if the defendant's evidence were merely met on that point, the plaintiffs would still be entitled to judgment upon their proof of the policy and the destruction of the building by fire. These two expressions, the "burden of proof" and the "burden of going forward with the evidence" and other expressions deemed synonymous, are often used with inexactness, the former expression particularly being used indiscriminately to denote both ideas, and perhaps generally little or no harm results practically from such looseness of expression. However, it is well to avoid it. Perhaps the only safe course is to use in each instance other language that is free from ambiguity. See 1 Elliott on Evidence, Ch. 7.

Exception 12 is abandoned. Exceptions 13 and 14, taken to the verdict as contrary to the law and the evidence and to the overruling of a motion for a new trial based on that ground,

need not be considered in view of the conclusion reached on exceptions 6, 8 and 9.

The verdict is set aside, a new trial ordered and the case remanded to the circuit court.

Ballou & Marx for the plaintiff.

A. G. M. Robertson for the defendant.

KWONG LEE YUEN & COMPANY v. MANCHESTER
FIRE ASSURANCE COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 10, 1905.

DECIDED APRIL 24, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE LINDSAY IN
PLACE OF WILDER, J.

EVIDENCE OF VALUE.

In an action to recover on a fire insurance policy one of the owners of the burned buildings may properly testify concerning their value at the time of the loss, it appearing that he built the buildings, knew their original cost, the use for which they were intended, the use which had been made of them and their value for the purpose of rental. Held: The refusal to allow this evidence to go before the jury and granting a non-suit on the ground of failure to prove the value of the burned buildings was erroneous.

1D.—*refusal to allow plaintiffs to re-open the case to put in further evidence.*

The court refused the plaintiffs' application for leave to re-open the case and put in further evidence, remarking that the application came too late after counsel had been advised that the court would grant a non-suit. Held: Not error; the meaning of the remark being that under the circumstances the judge did not regard himself as justified in allowing the case to be reopened.

OPINION OF THE COURT BY HARTWELL, J.

This was an action to recover on a fire insurance policy. The defendant at the close of the plaintiffs' case asked for a non-suit on two grounds, namely, the failure of plaintiffs to prove (a) the value of the burned buildings, and (b) the filing of proofs of loss with the company within sixty days, the time specified by the policy. The judge granted the non-suit on the first ground and denied the application by the plaintiffs for leave to re-open the case and put in further evidence of value. The plaintiffs by the present bill bring up exceptions taken to rulings excluding evidence of the value of the buildings, to the non-suit and to the denial of leave to re-open and put in further evidence. Exceptions bring up the question of the competency of Young Kee Kan, a member of the plaintiff firm, to testify to the value of the insured buildings at the time of the fire.

The plaintiffs' witness Young Kee Kan testified that the firm of which he was a member owned the burned buildings at the time of the loss, being "a one-story frame shingle cottage containing four rooms" in the rear of the plaintiffs' store and "a two-story frame shingle building adjoining the cottage above described;" that the buildings were rented; that he knew their value, basing his knowledge on the fact that he built them himself. His evidence of how much he paid for them was ruled out on the defendant's objection that it was irrelevant and immaterial. For the same reason he was not allowed to testify whether from his knowledge of the values of the buildings they were in excess of the values insured, namely, \$350 on the one-story house and \$400 on the two-story house. He testified that he built the buildings for his workmen and employes to sleep in; that he knew their rental value; but on the defendant's objection he was not allowed to testify what the rental value was, or whether from the fact that he built the buildings and knew how old they were he knew their approximate value. To the question how much they cost when new he answered that he "paid \$1,100 for them" in 1888 when they were built; that they were

built of small boards with iron roofs, although he was not certain but it was part iron roof and part shingle. He was not allowed to state if he knew the value of the two buildings or whether or not their value was or was not in excess of the insurance.

The defendant's contention that the evidence was inadmissible as tending to show the value of the buildings lost is largely based upon the claim that before a witness can be permitted to testify to an opinion as to value he "must be shown to be competent to speak upon the subject" and so "qualified to give an opinion" and "has had the means of forming an intelligent opinion derived from an adequate knowledge of the nature and kind of property." It is admitted by the defendant that "there is no inflexible rule of law defining how much a person must know about property before he can be admitted to give an opinion on its value," but it is contended "he must have some knowledge on the subject sufficient to enable him to form an estimate." It is further contended by the defendant that it was discretionary with the trial court to determine how much knowledge a witness must possess in order to be qualified to testify concerning value and that his ruling on the subject is "conclusive unless clearly erroneous as matter of law." The defendant cites many cases in support of its contention.

The plaintiffs contend that "in any case the owner of an article may usually testify to its value," citing 1 Greenleaf on Evidence, 532 (16 Ed.); that persons acquainted with property may state their opinion of its value merely because "they have a knowledge of the particular facts in the case which jurors have not," citing the following language of the court in *Patch v. Boston*, 146 Mass. 52, 56: "The objection that an owner and occupant of a house for seventeen years must be shown to be qualified to judge of the value of real estate before his expressed statement of an opinion of its value can be received in evidence against him, savors of too much refinement for practical purposes, and cannot be adopted. Usually such owner and occupant may be presumed to have a sufficient opinion of

the value of his property to make his admission competent against himself."

The question of evidence of value was considered and passed upon in *Pac. Mill Co. v. Enterprise Mill Co.*, ante, 288, in which it was held that witnesses could properly testify what in their opinion would have been the value two years ago of certain moldings which they had recently examined. It is true that in that case the witnesses were carpenters and therefore presumably experts on the value of wooden moldings, but the rule laid down was broad enough to admit evidence of value of persons who are not experts but "have some knowledge on which to base their opinions." The price paid by the owner for land may tend to show its value and the use to which property was to be put and its adaptability to any specific purpose may be considered by the jury in determining its fair value. *Huntington v. Attrill*, 118 N. Y. 365. The cost of machinery when new may be shown as some evidence of value in an action of trover. *Hawver v. Bell*, 141 *Ib.* 140. The witness knew enough about buildings, their original cost, the use for which they were intended and the use which had been made of them, and their present condition to testify concerning their value. His evidence ought to have gone to the jury subject, as it was, to cross examination. The exception to the refusal to allow the defendant to re-open the case to introduce further evidence could be sustained, if at all, on the theory that the judge, in remarking that the application came too late after counsel had been advised that the court would grant a non-suit, meant that he had no power to do so. We do not, however, think that he meant anything more than that under the circumstances he did not regard himself as justified in allowing the case to be re-opened. This exception is not sustained. The exceptions to the rulings concerning the evidence are allowed, as well as the exception to the non-suit, which we regard as "clearly erroneous."

Accordingly the verdict is set aside and a new trial is ordered.

Ballou & Marx for plaintiffs.

A. G. M. Robertson for defendant.

HAWAIIAN TRUST CO., LTD., A CORPORATION, v.
A. M. BROWN, HIGH SHERIFF OF THE TERRI-
TORY OF HAWAII.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 5, 1905.

DECIDED APRIL 25, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

MORTGAGE—description of property.

A mortgage conveying "all the property, of whatsoever nature or kind, now or during the continuance of these presents owned or possessed by the grantor, wherever the same may be situated, including, without prejudice to the generality of the foregoing description, the property set forth in the schedule hereto attached, marked, 'Schedule of fee simple lands, leaseholds and other property,' and made part hereof, and also all lands, tenements and hereditaments and all leaseholds hereafter acquired by the grantor, during the continuance of these presents, and all machinery, fixtures, furniture and furnishings upon or about the said fee simple lands and leaseholds described in said schedule or hereafter acquired by the grantor or used by the grantor in connection with its business in operating an hotel at Waikiki, Islands of Oahu," the schedule setting forth certain fee simple lands, leaseholds and machinery and "all and singular the furniture, furnishings, apparatus, fixtures and chattels in, upon or connected with the premises covered by the leaseholds and deeds aforesaid," does not include liquors and mineral waters.

OPINION OF THE COURT BY WILDER, J.

This is an action of replevin for a large amount of bottled liquors and mineral waters which was seized by the high sheriff in pursuance of an execution issued out of the first circuit court

against the Moana Hotel Co., Ltd. The decision of the first circuit court, jury waived, was in favor of plaintiff, and the case comes to this court on defendant's exceptions.

The first question presented is the ownership and right of possession to the articles in question. Ownership in plaintiff was relied on by virtue of a certain trust deed executed on November 1, 1901, by the Moana Hotel Co., Ltd., to the Hawaiian Trust Co., Ltd., as trustee, to secure \$100,000 worth of bonds in order to pay the costs and expenses in making improvements, extensions and increase in the property and business of the hotel company.

After the execution of the trust deed liquors were sold by the Moana Hotel Co., Ltd., daily in the regular course of business, and the stock was constantly being replenished. It did not appear how much, if any, of the articles seized was in the possession of and owned by the Moana Hotel Co., Ltd., at the time of the execution of the trust deed.

There are many provisions of this trust deed indicating that the articles in question were not included, and were not intended to be included, in it. The trust deed first conveys "all the property of whatsoever nature or kind, now or during the continuance of these presents owned or possessed by the grantor, wherever the same may be situated," (it is admitted by plaintiff's counsel that this description does not include the articles in question,) and "including, without prejudice to the generality of the foregoing description, the property set forth in the schedule hereto attached, marked, 'Schedule of fee simple lands, leaseholds and other property,' and made part hereof, and also all lands, tenements and hereditaments and all leaseholds hereafter acquired by the grantor, during the continuance of these presents, and all machinery, fixtures, furniture and furnishings upon or about the said fee simple lands and leaseholds described in said schedule or hereafter acquired by the grantor or used by the grantor in connection with its business of conducting and operating an hotel at Waikiki, Island of Oahu." Bottled liquors and mineral waters are not machinery, fixtures, furni-

ture or furnishings. Neither does the habendum include these articles. The schedule above mentioned is entitled "Schedule of fee simple lands, leaseholds and other property covered by foregoing trust deed," and enumerates certain fee simple lands, certain leaseholds and certain machinery, and then says "all and singular the furniture, furnishings, apparatus, fixtures and chattels in, upon or connected with the premises covered by the leaseholds and deeds aforesaid." The only word that could possibly include the articles is "chattels," and, when viewed in connection with the other provisions of this trust deed, it is clear that even "chattels" did not include them.

There is a provision in the trust deed that the grantor had the power to sell any of the property but only with the written consent of the trustee. This would seem to indicate that the parties did not intend to include liquors, because otherwise the written consent of the trustee would have been necessary every time a drink was sold. If it was the intention to include liquors, some provision would have been inserted to cover the daily disposition of them. Counsel for plaintiff admits that the deed did not include articles of food, such as groceries, and the like. But, so far as the description in the trust deed is concerned either both liquors and food articles are included or both are excluded. The provision in the trust deed, authorizing the trustee under certain circumstances to take possession of all the property and run it as a hotel, was used as an argument to show that it must have been the intention of the parties to include the liquors, as the selling of liquors was a part of the hotel business. But this provision also shows, even if the selling of liquors is a part of hotel business, which is doubtful, that liquors were not intended to be included, because if the trustee should take hold of the property and run it as a hotel, including the selling of liquors, a new liquor license would be necessary in so far as the selling of liquors was concerned, and such a new liquor license might or might not have been granted. Consequently, the inference, if any, to be drawn from this provision, is that the liquors were not intended to be included.

This trust deed seems to have been carefully drawn by one who knew his business, and included in it all that the parties intended to have included.

Where mortgaged goods are described as "all household and personal effects," and such general description is followed by a specific and minute description of the goods, the latter description limits the former to the property particularly described. *Kearney v. Clutton*, 106 Mich. 106.

The mortgage of "all groceries," contained in a "country and village grocery store," does not include pails, shovels, and the like, although such goods are usually kept in such a store. *Fletcher v. Powers*, 131 Mass. 333.

A chattel mortgage, given by a merchant, of "goods in (his) store," will not be held under those words to include a safe kept in his store, not for sale, but for his own private use. *Curtis v. Phillips*, 5 Mich. 111.

A chattel mortgage on the "fixtures, furniture and appliances used in and about the carrying on of" a certain store, was held not to cover wagons and teams used by the mortgagor for the delivery of goods from the store to his customers. *Van Patten v. Leonard*, 55 Ia. 520.

A mortgage of a foundry, with the engines, fixtures, machinery, tools and working plant therein, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto and read and construed as forming part of these presents." The deed contained no mention of stock in trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-on pages. The first twenty pages contained a detailed description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock in trade consists of bolts, brass-work, wrought and cast iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock in trade in and

upon the before mentioned foundry workshops and premises." Then came this clause: "The contents of the preceding twenty sheets is a complete and exact inventory of the fixtures, machinery, utensils and things in, upon or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors. It was held that the stock in trade was not included in the mortgage. *Ex Parte Jardine*, 10 Ch. App. Cas. 322.

We think that, if the trust deed intended to include liquors, it would have said so. In view of the conclusion reached upon the first question, it is unnecessary to pass upon the other points submitted.

The exceptions are sustained, the decision and judgment are reversed, and the case is remanded to the circuit court of the first circuit with directions to render judgment for defendant.

Kinney, McClanahan & Cooper and *S. H. Derby* for plaintiff.

Castle & Withington and *H. G. Middleditch*, with whom *A. M. Brown* was on the brief, for defendant.

HARRY J. JOHNSON v. LEE TOMA & COMPANY,
LIMITED.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 6, 1905.

DECIDED APRIL 25, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CODE PLEADING, CONSTRUCTION OF—*common count—theory of case—surplusage.*

Plaintiff's complaint averred his employment by defendant to obtain remission of duties assessed on three lots of goods imported by defendant from the Philippines; that defendant at the time of

the employment "promised and agreed to pay plaintiff for his services so much as the same should be reasonably worth according to the usual custom and standard for such services in similar cases prevailing at Honolulu, San Francisco and New York;" plaintiff's performance "to defendant's benefit and advantage in the sum of \$17,871.08, the aggregate amount of said assessment;" that the reasonable value of the services "according to the standard of compensation in similar cases prevailing in Honolulu, Washington and New York was one-third of the amount saved to the importer," being \$5,957.02, in which sum the defendant is indebted to plaintiff.

At the opening of plaintiff's case, in answer to the defendant's inquiry whether he claimed that "an express contract was entered into under the terms of which one-half was to be paid to the plaintiff," plaintiff said, "We are suing on a quantum meruit. To the defendant's further inquiry, "And counsel states that there was an express contract entered into?" answer was made, "That there was an express contract entered into at that time." Held: The complaint evidently counts upon a special agreement of hiring for an agreed price, but applying the rule of favorable construction of Code pleadings and the rule that the theory of the pleading on which the case was tried will not be changed by the appellate court, if it may fairly be so construed, this is treated as a cause of action indebitatus assumpsit or quantum meruit, and the averment of the defendant's agreement to pay is taken not as an express stipulation for price, but as averring the obligation implied by law to pay the plaintiff what he reasonably deserved for his service, the words "according to the usual custom," etc., being surplusage.

Id.,—evidence—express agreement in quantum meruit—liability of defendant on agreement made prior to its incorporation—novation of contract—value of service—unreasonable custom.

The evidence showed an express agreement of hiring made with a third person in respect of the first and second lots of merchandise. The defendant was not incorporated by organization until after the importation of the second lot and dealt with the plaintiff concerning duties upon the third lot only. The third person or the firm of L. T. & Co. of which he was manager, sold all the merchandise to the defendant L. T. & Co., Ltd., the remitted duties and the goods when released from bond were delivered to it, and its manager told plaintiff he would be paid, but he charged too much. Held: A special agreement of hiring for what the plaintiff reasonably deserved does not preclude an action on the com-

mon count for quantum meruit after performance of the service.

Upon the theory of novation the corporation, having taken over the assets and business of the incorporated firm of L. T. & Co., the facts justify the inference that it assumed the obligations of the firm in respect of the service performed concerning all of the duties, the plaintiff consenting thereto by bringing this action.

Plaintiff's evidence of his talk with L. T. (of defendant corporation) about reshipping cigars was properly admitted; and evidence of C. C. (president of defendant corporation) of dealing with plaintiff concerning a protest made prior to defendant's incorporation was properly admitted, but not so of plaintiff's evidence that in his opinion Congress would shortly enact a law (as it did) to authorize such duties, and that the law if enacted would include these goods held in bond, and therefore it was important promptly on hearing of a decision of the United States Supreme Court in a case pending when plaintiff undertook the service to get an order to the collector to release the goods. This evidence probably enhanced the value of the plaintiff's services in the opinion of the jury and was inadmissible.

The verdict (of \$3,500) was unsupported by evidence. The plaintiff's evidence of a custom in Honolulu and San Francisco to pay one-half of the amount saved to the importer was not evidence of what the plaintiff deserved for his services, since such a custom, if it exists and applies in all cases regardless of the nature of the services, is unreasonable. Plaintiff when he undertook the service knew that all he could do was to file protests and that a case was then pending in the United States Supreme Court, the decision of which would determine the legality of all those duties.

OPINION OF THE COURT BY HARTWELL, J.

A material question raised by the exceptions in this case is whether the action was for breach of an implied or an express agreement. At the opening of the plaintiff's case to the jury the plaintiff in answer to the defendant's inquiry whether he claimed that "an express contract was entered into under the terms of which one-half was to be paid to the plaintiff" said, "We are suing on a quantum meruit." To the defendant's further inquiry, "And counsel states that there was an express contract entered into?" answer was made, "That there was an

express contract entered into at that time." The substance of the averments in the plaintiff's complaint is that the defendant employed the plaintiff at Honolulu between May 13, 1901, and March 23, 1903, as a claim agent to represent its interests, prepare protests, etc., in its applications between those dates for abrogation of assessments and remission of duties to which under the collector's rulings the defendant had become liable on merchandise imported by it into Honolulu being (1) 3,100 pounds Manila tobacco wrapper imported May 13, on which the collector assessed \$5,753.50, of which the defendant paid \$1,864; (2) 1,016 11-16 pounds of cigars imported August 27, on which the collector assessed \$4,780.38, and (3) 100,000 cigars imported October 31, 1901, on which the collector assessed \$6,357.22; "that defendant at the time and times of said employments promised and *agreed* to pay plaintiff for his services, so much as the same should be reasonably worth, according to the usual custom and standard for such services in similar cases prevailing at Honolulu and San Francisco and New York;" that plaintiff accepted said employment and performed the same by filing in the name of Hind, Rolph & Co. protests against the classification, rulings and assessments of the collector and also by preparing and forwarding to the secretary of the treasury briefs and arguments in support of his contention that the duties had been illegally imposed; that in consequence of the plaintiff's efforts, knowledge and skill in preparing and filing said protests and presenting said cases to the secretary that official, on or about December 4, 1901, decided that said merchandise was not subject to duties, ordered a return to defendant of the \$1,864, directed the release of said merchandise to defendant, and thereupon that the collector in compliance with said decision and direction repaid to defendant the said sum of \$1,864 and returned said merchandise "to defendant's benefit and advantage in the sum of \$17,871.08, the aggregate amount of said assessments; that the reasonable value of plaintiff's services as hereinbefore set forth, according to the standard of compensation in similar cases prevailing in Honolulu, Washington and

New York was and is one-third of the amount saved to the importer; that one-third of the amount saved to the defendant by plaintiff was and is the sum of \$5,957.02, in which sum defendant in 1903 became and still is justly indebted to plaintiff."

By decisions in many states Code pleadings, such as this, permit common counts in actions on contracts, while in other states common counts are regarded as inapplicable, upon the ground that they do not state facts, but conclusions of law. For citations on this question see 4 Ency. Pl. & Pr. 611, n. 1; but we are not aware that it has ever been held that in Code pleading material facts may not be pleaded as well by express averment as by averment of other facts from which they are necessarily inferred. In *Sullivan v. Mining Co.*, 109 U. S. 550, the court, after remarking that "by the elemental rules of pleading facts may be pleaded according to their legal effect without setting forth the particulars that lead to it; and necessary circumstances implied by law need not be expressed in the plea," held. "We find nothing in the statutes of Colorado which changes the rules of the common law in this respect."

The complaint before us evidently counts upon a special agreement of hiring for an agreed price, but it does not follow that the plaintiff by defendant's acquiescence could not properly have treated it as he did do, as a quantum meruit. When a contract "has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or indebitatus assumpsit, and rely upon the common counts." *Dermott v. Jones*, 2 Wallace 9. "Indebitatus assumpsit will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed." *Bank v. Patterson*, 7 Cranch 301. "Although a party may perform services under a special agreement, when the contract has been completed on one side, and nothing remains to be done but the payment of money, the party may maintain an action under the common counts, and introduce, in support of the complaint, evidence of a special

contract of employment, as tending to show the character of the services rendered, the length of time, and also the value of the services." *Woodrow v. Hawving*, 105 Ala. 240, 16 S. R. 720.

In *Foltz v. Cogswell*, 86 Cal. 542, the complaint alleged that the defendant promised to pay the plaintiff for her professional services \$5,000, the performance of certain services and that they "were reasonably worth \$5,000." To the appellant's contention that "the claim of plaintiff is based upon an express contract for the sum demanded for her services, and that it was error to admit evidence in support of a demand upon a quantum meruit," the court said: "The complaint, it is true, states in one place that she was to be fully paid for her services, to wit, \$5,000; but, reading the complaint as a whole, the substance of which we have set out above, we think it clearly shows that the action is upon an implied contract for the reasonable value of her services, alleged to be reasonably worth the sum demanded, and not upon an express contract for that sum."

Applying to the complaint the rule of favorable construction usually given to Code pleadings, and also the rule that the theory of the pleading on which the case was tried will not be changed by the appellate court, if it may fairly be so construed, we treat this pleading as a claim that the plaintiff, having engaged the defendant to perform service, which was performed accordingly, was under the legal obligation to pay the plaintiff what he reasonably deserved therefor; in other words, as a cause of action *indebitatus assumpsit* or *quantum meruit*. This construction requires that the averment that the defendant agreed to pay the plaintiff as much as his services should be reasonably worth according to the usual custom, etc., be taken not as an express stipulation for the price, but as stating nothing more than the obligation which the law placed upon the employer, the words "according to the usual custom," etc., being treated as surplusage.

We will now consider the defendant's exception to the denial of its motion at the close of the plaintiff's case for a directed verdict. The motion was based in substance on the grounds

that (1) There was no evidence to hold the defendant liable. (2) The action was brought on a contract made prior to the defendant's incorporation. (3) and (4) The proof showed an express contract of hiring, while the plaintiff claimed on a quantum meruit. (5) There was no proof of the reasonable value of a broker's services according to the custom and standard established in Honolulu, San Francisco and New York.

According to the foregoing views the third, fourth and fifth grounds of the motion for a directed verdict, referring merely to an express agreement, cannot be sustained. The first and second grounds of the motion not only involve the question whether the averment of the plaintiff's employment by the defendant and his performance of the service pursuant thereto could be supported by evidence from which a request to perform could be inferred, but whether there was evidence on which a novation of the plaintiff's contract, whether express or implied, could be inferred. Undoubtedly it is not enough to hold one liable to pay for service that he was benefited thereby, although "if one voluntarily accepts services rendered for his benefit, when he has the option whether to accept or reject them, a promise to pay for them may sometimes be inferred." *O'Connor v. Hurley*, 147 Mass. 145. When one performs services for another, with the latter's knowledge and consent or acquiescence, a request by the latter to perform the service and a promise of compensation for the same may be implied.

As to the plaintiff's services concerning the third importation of October 31, 1901, there was evidence on which a finding could have been made that the defendant requested and promised to pay for it. This evidence appears in the protest against duties on the goods imported October 31, prepared by the plaintiff and signed "Lee Toma & Co., Ltd., per S. Chang Chow, president," and in the evidence that after the goods were released Chang Chow told the plaintiff that the defendant would pay for his service, although he said he thought the plaintiff charged too much. This evidence taken in connection with the fact that upon the incorporation of the defendant it took over

the assets and business of the incorporated firm of Lee Toma & Co., including the \$1,864 remitted duties and the released merchandise, justifies the inference that it assumed the obligations of the firm in respect of the service performed concerning the duties, and that Chang Chow, the president of the defendant corporation, recognized this liability in talking with the plaintiff about paying for his services. In *Marconi's Tel. Co. v. Cross*, *ante*. 393, this court held that upon the facts in that case there was a novation of the contract made between the parties whereby a corporation formed by the defendant had adopted the defendant's contract, and the plaintiff had impliedly released the defendant and assented to the adoption of the contract by the corporation. We held in that case that "the contract was made with the mutual intention that it would be assigned to a corporation to be formed for the purpose of taking it, and that the assignment was made accordingly and assented to by the subsequent conduct of the plaintiff, with the implied agreement that the assignment should operate as a release of the defendant from his obligation. Or the evidence would have justified a finding of a 'waiver of the original contract by the mutual understanding of the parties.'" In this case we cannot say that the engagement of the plaintiff was made with the intention which appeared in the case cited; but adoption by the defendant of Lee Toma & Company's liability may be inferred from the conduct of the parties, the plaintiff by bringing this action assenting thereto. The exception to the refusal to direct a verdict is therefore not sustained.

The exception to the ruling out of the evidence of the date when the defendant corporation was organized is sustained, but the exceptions to the plaintiff's evidence of his talk with Lee Toma about reshipping the cigars and to Chang Chow's evidence, that Lee Toma & Co. dealt with the plaintiff concerning the protest which was dated prior to the filing of defendant's articles of association, are not sustained. But there was no evidence on which the verdict for \$3,500 can be sustained, for we do not regard the plaintiff's testimony of a custom in Honolulu

and San Francisco to pay one-half of the amount saved to the importer as evidence of what the plaintiff deserved for his services, since such a custom, if it exists and applies in all cases regardless of the nature of the services rendered, is unreasonable. The plaintiff testified that he made the protests against duties, claiming that the merchandise, coming from the Philippine Islands, was not subject to duties, and knowing perfectly well that a case was then pending in the United States Supreme Court, the decision of which would determine the validity of all such duties. There was nothing to be done except to prepare and file protests, and the plaintiff did nothing else except that on hearing in San Francisco of the decision he telegraphed in the name of Hind, Rolph & Co. to the department in Washington requesting a telegraphic order to the collector in Honolulu to deliver the goods, which was done. The plaintiff's evidence that in his opinion Congress would shortly enact a law (as it did do) to authorize such duties and that the law, if enacted, would include these goods held in bond, and therefore it was important to act promptly in getting an order to the collector to release the goods, was allowed to go before the jury under exception from the defendant and probably in the opinion of the jury enhanced the value of the plaintiff's service. This evidence was inadmissible and the exception to its admission is sustained. The exception to the verdict as contrary to evidence, in the meaning that it was unsupported by evidence, is sustained.

Therefore, as well as on the ground of the exceptions sustained as above, the verdict is set aside and a new trial is ordered. The case is remanded for further proceedings consistent herewith.

Lorrin Andrews and *W. S. Fleming* for plaintiff.

R. W. Breckons and *A. S. Humphreys* for defendant.

M. B. SILVEIRA v. L. AH LO.

REHEARING.

ARGUED MARCH 20, 1905.

DECIDED APRIL 27, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE LINDSAY IN
PLACE OF WILDER, J.

OVERLEASE OR GRANT OF LAND SUBJECT TO LEASE—*rent goes with reversion, but may be severed and reserved to lessor or grantor.*

An overlease as well as a grant of land subject to outstanding leases carries with it as an incident the right to the rent thereafter accruing, but the rent may be severed from the reversion and reserved to the lessor or grantor by a clear expression of intention to that effect.

1D.—*effect of words "subject to" outstanding leases.*

A mere certificate by the overlessee that he knew of the outstanding leases and took his lease subject to them would not operate to sever the rent from the reversion and reserve it to the lessor or to postpone the commencement of the overlease until the termination of the outstanding leases, although it would relieve the lessor from liability for a breach of the covenant of quiet enjoyment so far as the outstanding leases were concerned.

1D.—*agent for lessor and overlessee when acting for lessor against lessee not presumed to be acting for overlessee also.*

Nor would the mere fact that a third person was an agent for both the lessor and the overlessee and that he caused an action to be brought on behalf of the lessor for the rent under the outstanding leases show that the overlessee was not entitled to such rent.

1D.—*lessee may refuse to pay lessor rent though overlessee has not demanded it.*

Although the lessee would be protected in paying rent to the lessor if he had no knowledge of the overlease, he would be justified in refusing to pay him when he learned of the overlease, even though the overlessee had made no demand on him for the rent.

OPINION OF THE COURT BY FREAR, C.J.

The plaintiff executed two leases to the defendant, one to expire May 1, 1903, the other January 1, 1905, each being for fifteen years and at a monthly rental. Before the termination of these leases he executed a third lease of the same and other lands to one Mendonca to begin June 1, 1900, and to be rent free for the first four months and at a specified rental per month for the further term of fifty years. He afterwards brought this action for the rent that accrued under the first two leases from January 1, 1900, to February 28, 1902, and obtained a verdict for the amount claimed. The defendant took exceptions, which were overruled (*ante*, page 309), but a rehearing was granted (*ante*, page 466) and has been had upon the question whether the plaintiff was not precluded from recovering such rent after the commencement of the lease to Mendonca, on the theory that the right to rent to accrue under the first two leases passed to Mendonca by operation of law upon the lease of the reversion to him.

It is settled law, undisputed in this case, that a grant of land which is subject to an outstanding lease carries with it as an incident of ownership the right to the rent, although the right to the rent may be severed from the reversion and reserved to the grantor by a clear expression of intention to that effect. The same is held of an overlease, which may be considered as a transfer of a part of the reversion. 18 Am. & Eng. Enc. of Law, 2nd. Ed. 283, and cases there cited. Probably less would be required to show an intention on the part of the grantor to sever the rent from the reversion in the case of an overlease than in the case of a grant of the entire reversion. The question in this case is whether there is enough to show that the plaintiff reserved to himself the rents to accrue under the first two leases after the term of the overlease began.

What is chiefly relied upon to show such an intention is a document executed by Mendonca (on the date on which he acknowledged his execution of the lease made to him) in which

he certified that he was "aware" of the fact that three of the pieces of land covered by his lease were then partly under the two leases made to the defendant and partly under a lease made to another person, and in which he "further" certified that his lease "was granted subject to the aforementioned three leases." We will assume that this document may be regarded as part of the lease made to him and, if necessary, supported by the same consideration, in other words, that the effect of the words "granted subject to the aforementioned three leases" would be the same as if those words had been inserted in the lease itself. There are two theories upon which it might be contended that these words continued the plaintiff's right to rent under the defendant's leases after the execution of Mendonca's lease. One is that they severed the rent from the reversion and operated as a reservation of the rent by the plaintiff or as a grant of the rent to the plaintiff. The other is that they postponed the commencement of Mendonca's lease until the termination of the defendant's leases. Neither of these theories can be sustained.

The document cannot be regarded as severing the rent from the reversion and reserving or granting it to the plaintiff, for it makes no reference to the rent, and is neither in the form of a reservation of the rent by the plaintiff nor in the form of a covenant by Mendonca that the plaintiff should have the rent. It is a mere statement or certificate by Mendonca of the fact, and of Mendonca's knowledge of the fact, that his lease was subject to the leases then outstanding—facts that existed irrespective of any agreement. That lease could not in the nature of things have been made except subject, that is, subordinate, to the leases previously made and then unexpired. This is well brought out in the case of *Biddle v. Hussman*, 23 Mo. 597, in which the owner of certain land, after having leased it for a term of years, conveyed with others a portion of this land and other pieces. It was held that the lessor or grantor could not recover the whole of the rent, inasmuch as the conveyance of a portion of the land carried with it as an incident a proportion-

ate part of the rent, and that a clause to the effect that the conveyance was made "subject to said lease" did not amount to a reservation of the rent to the grantor. The court said:

"The words of the clause are: 'It being understood that some of the said first parties have made leases for portions of the wharf property thereby conveyed, the terms of which have not expired, this conveyance to the city is made by the said first parties, subject to said leases now in existence.' These are not apt words of exception, reserving from the operation of the grant something that otherwise would have passed, and they do not import in their ordinary signification that the grantor thereby holds back and excepts from his grant something that the grantee would otherwise have taken under it. They refer to the condition of the grantor in reference to the land he is disposing of, and then declare that the grantee takes it subject to existing leases. That was all that the party could lawfully transfer, and, no matter what was the form of the deed, it could be effectual only to that extent. If no notice had been taken of the lease, the deed might have been considered in form a conveyance of the fee in possession, although it would have been in effect only a conveyance of the reversion; and the purpose in this clause, we think, was to make the deed in form what it was in effect; in a word, the declaration that the property is subject to an existing lease, and that the grantee takes it with that burden upon it, expresses only—what otherwise would not have been apparent—that the transaction is a transfer of the grantor's reversionary interest in the property only, and not of an estate in possession. The effect of the deed, therefore, was to divest Biddle of a proportionate part of the rent."

The words "subject to" the existing leases may be fully and most naturally explained on another theory than that they were intended to operate as a reservation of the rent, namely, on the theory that they were intended to relieve the lessor from liability on his covenant of quiet enjoyment in so far as the outstanding leases were concerned. The lessor would have been liable for a breach of that covenant in the overlease if the overlessee had taken his lease without knowledge of the defendant's outstanding leases. The certificate in question, that the overlessee was aware of such leases and took his lease subject to

them, would prevent that result. It was intended to protect or had the effect of protecting the lessor against the claims of others and not of protecting him against or in the enjoyment of his own claims. This is illustrated in *Gale v. Edwards*, 52 Me. 363, as well as in the Missouri case just referred to. In the Maine case the owners of the land conveyed the reversion "subject to" a certain lease and covenanted that the premises were free of all incumbrances "except that above mentioned" and warranted the premises against the lawful claims of all persons "except said lessees or assigns." The court held that the rent was incident to the reversion and passed with it and that the legal claim for rent was transferred to the grantee, "who, in his own name, alone, could maintain an action for it, unless it was reserved to the grantors in their deed, in language fit and appropriate for such a reservation; none such was inserted, but words only intended as a protection against the general covenants of warranty, against 'the claims and demands of the lessees,' and not the grantors' claims against them."

Likewise, the theory that these words operated to postpone the commencement of Mendonca's lease until the termination of the defendant's leases cannot be sustained. Of course, if that were the effect of these words, the right to the rent would remain in the plaintiff, for he would still have the reversion until the termination of the defendant's leases. Mendonca's lease would not, strictly speaking, be an overlease or a concurrent lease, and there would be no privity of estate between him and the defendant entitling him to the rent. The difficulty with this theory, however, is that the express terms of the overlease itself show that it was to take effect in praesenti. The habendum is "unto the lessee from the first day of June, 1900, for the term of 4 (four) months free of all rent, and for a further term of 50 years (fifty years) from the first day of October, 1900, thence next ensuing, the lessee yielding and paying during such further term of 50 (fifty) years unto the lessors the monthly rental of \$225 (two hundred and twenty-five dollars) in advance on the first day of each and every month during the continuance of

this lease, the first of such monthly payments of \$225 to be made on the first day of October, 1900." The other terms of the lease are in harmony with the habendum, and, indeed, emphasize what is shown by the habendum, that Mendonca's lease was to take effect before the expiration of the previously existing leases to the defendant.

The fact mainly relied on outside the certificate above mentioned, to show that the plaintiff was to continue entitled to the rent notwithstanding the overlease to Mendonca, is that one Bolte was the agent of both the plaintiff and Mendonca. But Bolte could not as agent of one make a contract with himself as agent of the other so as to bind either in the absence of consent or ratification by them, nor did he attempt to do that so far as appears. The lease itself was executed by the plaintiff and Mendonca personally and the certificate by Mendonca himself. The fact, if it was a fact, that Bolte negotiated the terms of the lease between them, would not of itself require the lease and certificate to be construed otherwise than according to their plain meaning. If Bolte was still the agent of both the plaintiff and Mendonca at the time this action was instituted, it would not follow that he was acting as agent of Mendonca in instituting the action or procuring its institution. The action was instituted on behalf of the plaintiff. Mendonca is not a party to it and was not even called as a witness. Neither is Bolte a party to the action. There is nothing to show an agreement between the plaintiff and Mendonca as to a reservation of rent; there is nothing to show that Mendonca would be estopped from claiming the rent afterwards if the plaintiff should recover it in this action. If Bolte had the action brought on Silveira's behalf merely because he thought Silveira was entitled to the rent as matter of law in general or upon his construction of the lease and certificate, it would not follow that Mendonca would be bound.

The defendant would be protected in paying rent to the plaintiff if he did not know of the overlease to Mendonca, but having such knowledge he would pay to the plaintiff at his peril. In

order to justify him in declining to pay to the plaintiff it was not necessary that Mendonca should have made demand on him or given him special notice of the overlease and that he, Mendonca, claimed to be entitled to the rent. Simple knowledge of the overlease was sufficient to justify the defendant, in order to protect himself, in refusing to pay the rent to the plaintiff. Knowledge of the overlease or grant of the reversion need not be communicated from the overlessee or grantee. It may come from any source. This follows from the very nature of rent. The transfer of the reversion or a part thereof is not an assignment of a nonnegotiable chose in action. It is a transfer of real property which carries with it the rent as an incident, and as soon as the prior lessee learns that the right to the rent has become vested in another than his lessor he can continue paying the rent to the lessor only at his peril. *Peck v. Northrup*, 17 Conn. 217, was a case much like the present so far as this point is concerned. In that case the plaintiff leased the premises to the defendants for three years. A few months later he executed a quitclaim deed of the premises to another, which deed was recorded, just as the overlease in the present case was made and recorded. He afterwards brought action against the lessee for rent. There was no proof nor was it claimed that any of the rent had been paid to the grantee or that the grantee had ever demanded payment of the rent or that he had ever given the defendants any notice that the leased premises had been conveyed to him by the plaintiff or that the defendants had any notice of such conveyance other than that furnished by the recording of the deed. The court held that the conveyance carried the rents thereafter accruing as an incident to the reversion, that the lessor could not sustain the action, that he could not avail himself of the want of notice to the lessee of such conveyance, and that the recording of the deed was sufficient notice to the lessee and every one else. Among other things, the court said:

"Neither is it competent to the plaintiff to insist, as he does, that the defendants had no notice of the assignment of the

reversion. This is entirely unlike an assignment of a chose in action, where, to perfect it, notice must be given to the debtor. The land was assigned, and the rent only as incidental; and notice of the transfer of the land was given to the defendants and everybody else, by the recording of the quit-claim deed. More than this—no one but the defendants can complain of the want of notice. If the deed had not been recorded, and if the defendants had paid the rent to the lessor, without notice of the assignment, they might well complain, if afterwards sued for it by the assignee.”

In one case, it is true, namely, in *Gray v. Rogers*, 30 Mo. 258, the court seemed to take a different view and implied that the lessee could not set up a grant of the reversion in defense of an action for the rent by the grantor or lessor unless the grantee had notified him that he, the grantee, claimed the rent. That case differed from this in its facts in several respects but, if not sufficiently to distinguish it from this case, it is contrary to the general run of authorities and inconsistent with the reason upon which the rule that the rent goes with the reversion is based. The court seemed to have the impression that the matter of the rent was one solely between the grantor and grantee and that it was purely gratuitous on the part of the lessee to fight the battles of the grantor and grantee. The lessee, however, in defending against the grantor was not fighting for the grantee; he was fighting for himself—to avoid being compelled to pay the grantor first and the grantee afterwards. If he paid the wrong man, that would not prevent the right man from compelling him to pay a second time. It would be his legal right to decline to pay anyone but the proper claimant.

In the absence of proof of any agreement or conduct on the part of the overlessee that would prevent him from recovering the rent from the defendant, it must be held that the lessor is not entitled to the rent. The defendant should not be required to pay the plaintiff when he may be called upon to pay Mendonca. It may be that evidence can be produced on a new trial which will show that the plaintiff is entitled to the rent.

Accordingly, the former decision overruling the exceptions is reversed, the verdict set aside and a new trial ordered.

A. G. M. Robertson for plaintiff.

Castle & Withington for defendant.

OPINION OF HARTWELL, J., CONCURRING IN REVERSAL OF
DECISION.

The law involved in this case is so clear that I am not aware that the court at any time felt any doubt about it; but at the rehearing it appeared that a majority of the court had considered the admissibility rather than the legal effect of Mendonca's written statement that he was aware of Ahlo's leases and that his own was subject to them. I had myself inferred, and I thought that my associates had also inferred from the statement and from the other facts in the case that when the plaintiff made his lease to Mendonca, each being represented by Bolte, they expected that Ahlo in his own interest would shortly surrender his leases and agreed that meanwhile Mendonca should neither take the Ahlo rent nor pay rent himself. The case still looks that way to me, but rather than risk making Ahlo liable both to Mendonca and to the plaintiff I concur in the reversal of the former decision.

AMERICAN-HAWAIIAN ENGINEERING & CON-
STRUCTION CO., LTD., A CORPORATION, v. TER-
RITORY OF HAWAII.

ORIGINAL.

ARGUED APRIL 20, 1905.

DECIDED APRIL 28, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ACTION AGAINST TERRITORY—*petition*.

In an action against the Territory the petition is not demurrable for failing to show that petitioner, if a foreign corporation, is entitled to sue the Territory, when the petition does not show that petitioner is a foreign corporation.

CONTRACT FOR CONSTRUCTING PUBLIC WORKS.

A petition claiming extras under a contract for the construction of public works, which does not show that the extras were furnished upon the written order of the superintendent of public works, as required by the terms of the contract, is bad on demurrer.

Under a contract for the reconstruction of a warehouse involving the removal of an existing structure and providing that all old material was to be preserved and used in the construction of the new building unless unfit in the opinion of the superintendent of public works, a claim for the value of old material removed and appropriated by the Territory without alleging that such material was fit to be used in the new structure and that the contractor was forced to secure other material for the new building in place of that which was removed is demurrable.

Under a contract to remove an existing structure and construct a new wharf and shed, which contract was held invalid, the Territory is not legally liable on an implied contract for the removal of the structure, such removal having been completed before the contract was declared invalid.

OPINION OF THE COURT BY WILDER, J.

This is an action against the Territory for \$4,475.20 (incorrectly stated in the petition to be \$4,425.20), consisting of the following items, to wit: \$604, balance claimed to be due under a contract for rebuilding Fort street wharf; \$2040.80 for extras under said contract; \$300 claimed to be due under a contract for the reconstruction of the Brewer warehouse, being for old material removed by the Territory; and \$1,530.40 for labor and material which the Territory received the benefit of in connection with a contract in reference to Brewer's wharf and shed, which contract was held invalid in *Lucas v. Construction Co.*, 16 Haw. 80. To this petition the Territory demurred.

The first ground of demurrer is that the petition does not show whether petitioner is a domestic or a foreign corporation and, if it is a foreign corporation, that it is entitled to sue the Territory. The petition states that "it is and was * * * a corporation duly organized, existing and having a usual place of business in said Territory of Hawaii." This point is without merit. The respondent relies upon the case of *Heeia Sugar Plantation Co. v. John McKeague*, 5 Haw. 101, but in that case it appeared upon the face of the complaint that plaintiff was a foreign corporation, which clearly distinguishes it from the case at bar. In this case, it not appearing from the petition that petitioner is a foreign corporation, if that is the fact, it is a matter of defence. The first ground of demurrer is overruled.

The second ground of demurrer is that the petition does not state facts sufficient to constitute a cause of action. The first item consists of a claim for \$2,264.80, being \$604 balance claimed to be due under a contract for rebuilding Fort street wharf and \$2,040.80 for extra work under said contract. The claim for \$604 is sufficiently pleaded. As to the claim for \$2040.80, the demurrer must be sustained. The petition alleges that this extra work was performed at the request of the Territory. The specifications under this contract provide that no

claim for extra work would be allowed except upon the written order of the superintendent of public works or his authorized agent. In so far as the petition does not allege that this extra work was authorized under the terms of the contract and its specifications the demurrer is well taken.

A complaint for extra work and materials by one who contracted with the city to make certain public improvements, which does not show that the extra work and materials were performed and furnished upon orders in writing signed by the engineers and approved by the common council, as required by the terms of the contract, is bad on demurrer. *City of Huntington v. Force*, 152 Ind. 368. See also 1 Smith on Municipal Corporations, Sec. 741.

Counsel for the petitioner claims that, even though the contract required a written authority for extras, such written authority could be waived, but, even if that be so, such waiver or other excuse for not having such written authority should be alleged.

The next item arises under a contract for the reconstruction of the Brewer warehouse. It is alleged that the petitioner "performed all and singular its obligations imposed upon it by said contract * * * and that the Territory of Hawaii has paid all the money considerations set forth in said contract, and that the said Territory in violation of said contract removed all the old structures on the new site and sold the material in the same and appropriated the proceeds to its own use, thereby depriving your petitioner of the benefit of the said material, which was then and there of the value of \$300." A copy of the contract with its specifications is attached to the petition. This was a contract "to remove and reconstruct the Brewer's warehouse." That part of the specifications material on this point is as follows:

"Removal of old building:

"The contractor will remove the old building preserving all the material. The bricks to be thoroughly cleaned of all mortar.

All roofing, roof, timbers, doors and windows to be carefully removed and preserved for use in the new building.

"Addition materials:

"The contractor will furnish any and all new material that may be needed to reconstruct the building upon the new site. None of the old material that in the opinion of the superintendent of public works is unfit shall be used in the new structure.

"Roof covering:

"Roof to be of galvanized iron, properly flashed into gable ends and louvre. Contractor in removing same from old building will use all he can of such portions of the old roofing that is fit to be used in new structure. Contractor will furnish any additional roofing needed of same gauge as old."

Under these provisions all old material was to be preserved and all of it that was fit used in the construction of the new building. The contractor received a lump sum for doing the work and did not acquire any right or title to any of the old material. All it was entitled to was to use the old material in the construction of the new building unless unfit in the opinion of the superintendent of public works. If this material that was removed was fit to be used in the construction of the new building, and in consequence of the same having been removed the contractor was under the necessity of securing other material for the new building to its damage in the sum of \$300, such allegations should be made. To this item the demurrer is sustained.

The last item of the claim arises under a contract "to furnish all labor and material in removing existing structure and construct Brewer's wharf and shed," which contract was held to be invalid in *Lucas v. Construction Co.*, 16 Haw. 80. Petitioner alleges that it removed the existing structure before the contract was annulled, and that by reason thereof the Territory has received the benefit of the labor and materials in removing same, which were of the reasonable value of \$1530.40.

It is claimed by petitioner that the statute under which this contract was let did not require the part performed, that is, the removing of the existing structure, to be awarded only on public

advertisement for tenders, and that, therefore, the superintendent of public works having power to contract for the removal of the existing structure and the structure having been removed to the benefit of the Territory, the Territory is liable on an implied contract to pay for same.

The statute in question is Act 18 of the Extra Session Laws of 1903. Section 10 of this Act reads as follows: "Every contract for constructing public works, or for furnishing material therefor amounting to Five Hundred Dollars (\$500) or more, shall be awarded to the lowest bidder who shall furnish a sufficient bond only upon public advertisement for tenders; and no public work or requirement for material therefor shall be divided or parcelled out for the purpose of evading the provisions of this Section."

The contract was for a lump sum to remove existing structures and to construct in place thereof a new wharf and shed. The whole contract was held invalid, the part to remove as well as the part to construct. The legislature intended that "contracts for constructing public works" should have a broad meaning by providing in the same section that no *public work* should be divided or parcelled out for the purpose of evading its provisions. To construe "constructing" as meaning simply the erecting or building would be to defeat the very object of the section, which is to prevent favoritism, corruption and extravagance in the performing of public work under contract. As used in this section the construction of public works includes not only the erection or building of the same but also everything incidental thereto necessary and proper for the completion of such work. In the case at bar the removal of existing structures was but an incident to the main work.

As there was no authority to contract for the removal of existing structures except in the mode expressly prescribed in the statute, it follows that the Territory is not liable legally on an implied contract for same, because the law never implies an obligation to do that which it forbids a party to agree to do, and that which can only be accomplished directly cannot be

accomplished indirectly. See *Zottman v. San Francisco*, 20 Cal. 96; *McDonald v. Mayor*, 68 N. Y. 23; *Boston Electric Co. v. Cambridge*, 163 Mass. 64; *Butler v. Charleston*, 7 Gray 12; *Springfield Milling Co. v. Lane Co.*, 5 Ore. 265; *Richard v. Warren Co.*, 31 Ia. 381.

It was well said in *Zottman v. San Francisco*, supra, that "The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case." Here, neither the officers of the corporation, nor the corporation by any of the agencies through which they act, have any power to create the obligation and pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do." The doctrine of liability upon an implied contract, where work is performed by one the benefit of which is received by another, does not apply where there are statutory restrictions upon the party sought to be charged against making in direct terms a similar contract to that which is claimed to be implied.

As to this item the demurrer is sustained.

If the Territory has received a benefit to the extent claimed, there being no legal liability, the propriety of paying for such benefit is for the legislature.

It is unnecessary to pass upon the other grounds of the demurrer.

The demurrer to the petition is sustained with leave to petitioner to file an amended petition within ten days if so advised.

Castle & Withington for petitioner.

M. F. Prosser, assistant attorney general, for respondent.

W. W. BIERCE LTD., v. C. J. HUTCHINS, TRUSTEE.

PETITION FOR REHEARING.

ARGUED MAR. 13 AND APR. 18, 1905. DECIDED APR. 29, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

ELECTION—its nature and effect.

Election is a choice between inconsistent remedial rights. It may be manifested by the institution of an action to enforce one of the rights, whether the action is carried to completion or not and whether, if it should be carried to completion, it would be successful or not. It is of rights rather than of remedies, the attempt to enforce a particular remedy being the manifestation of the choice of one of the rights. But there cannot be an election unless there are two or more rights to elect between, and so the bringing of an action to enforce a supposed but non-existing right does not preclude the bringing of an action to enforce an inconsistent right. Likewise, even if there are two or more inconsistent rights and an action is brought to enforce one, there is no election, if such action is brought in ignorance of the facts; but if the action is brought with knowledge of the facts, there is an election, even though there is no actual intent to abandon the other inconsistent right or rights. Other actions may be brought to enforce the same or other consistent rights but not to enforce other inconsistent rights. And, of course, there is no election when inconsistent rights are proceeded on at the same time. An election once made is irrevocable. It differs from the various classes of estoppel proper and rests on the principle that one cannot occupy inconsistent positions.

Id.—of right to proceed on theory of absolute sale by bringing lien suit, precludes proceeding on theory of conditional sale by replevin.

In the case of a conditional sale, the vendor may waive the condition and treat the sale as absolute, as, by instituting a materialman's lien suit based on the theory that the title has

passed to the vendee, but if he so elects with knowledge of the facts he cannot afterwards treat the sale as conditional, as, by bringing replevin based on the theory that the property is still in him. Such is the result, even though the lien suit could not have been carried to judgment with success, for in such case the election is between the existing inconsistent rights to proceed on the theory that the title has passed and to proceed on the theory that it has not passed; it is not merely between a supposed but non-existing remedy by lien suit and an existing remedy by replevin.

Id.—cannot be made to treat sale conditional in part and absolute in part.

The bringing of the lien suit bars the action of replevin even though only a portion of the items covered by the contract and for which the lien suit was brought are lienable.

OPINION OF THE COURT BY FREAR, C.J.

This is a petition for a rehearing of the case decided *ante*, page 418. The action is replevin for rails, cars, etc., claimed to have been sold by the plaintiff on the condition that title should remain in it until payment. The court held that even if title were to remain in the plaintiff until payment still the plaintiff could not maintain replevin, which is based on the theory that the title was in it, for the reason that it had previously elected an inconsistent right by bringing an action for the price and to enforce a materialman's lien, which was based on the theory that the title had passed to the vendee.

For the purposes of the original decision it was assumed that the contract was one of conditional sale or, perhaps more accurately speaking, that it was an executory contract to sell upon condition precedent. We will proceed upon that assumption for the purposes of the present decision also, although it may not be out of place to state that in the opinion of a majority of the court the sale was absolute and therefore replevin could not be maintained in any event.

The petition sets forth seven grounds, all of which were either considered by the court or not raised by counsel at the original hearing. They may be summed up as follows: (1) That the

court should have decided, but did not do so, whether the plaintiff is entitled to a new trial as regards the items which, by reason of not having become attached to the realty, were not subject to a materialman's lien, and (2) that the court overlooked or did not give due consideration to certain points bearing upon the question whether the institution of the materialman's lien suit amounted to an election.

As to the first of these grounds, the court merely reversed the judgment of the trial court and remanded the case for such further proceedings as might be proper, not knowing whether the plaintiff would be able to introduce further evidence bearing on the question of election which would make it worth while to have a new trial. Apparently the plaintiff knows of no other evidence that it can introduce upon that question but now asks the court to decide whether the election manifested by the institution of the lien suit extended to all the items covered by the contract or only to the lienable items. It was unnecessary to pass upon this as a primary question in the original opinion but it was passed upon incidentally by inference from the reasoning in that opinion. It goes without saying that the plaintiff could not elect to treat the sale as absolute as to part of the property covered and conditional as to the remainder. The lien suit was in fact instituted as to all the items.

As to the second ground, it will be unnecessary to discuss in detail all the points raised by counsel, for to do that would mean largely a repetition of what was said with more or less fulness in the former opinion upon the doctrine of election and its application to the facts of this case. It will be sufficient to refer to a single point in regard to which counsel for the plaintiff seems not fully to understand the former opinion. As shown in that opinion the election is not so much between remedies as between rights. The election in this case was between the right of the plaintiff to proceed upon the theory that the sale was conditional and that the title remained in it until payment, and the right to proceed on the theory that the sale was

absolute and that the title had passed to the vendee, the plaintiff having a choice between such rights if the contract was one of conditional sale. The election was between the right to the property on the theory of conditional sale and the right to the purchase price on the theory of absolute sale. It was not, as contended by the plaintiff, between a remedy by lien suit and a remedy by replevin. An election is an unequivocally manifested choice between two or more inconsistent rights. The pursuit of a particular remedy is the manifestation of the choice between the rights. If two rights exist the choice may be manifested by the institution of an action, whether the action is or could be carried to completion with success or not. If the action is discontinued or fails of success the plaintiff may pursue other consistent remedies, that is, other remedies based on the same or a consistent right, but not other inconsistent remedies, that is, remedies based on an inconsistent right. If there is in fact only one right the institution of any number of actions on supposed but nonexistent other inconsistent rights will not amount to an election or prevent the institution afterwards of an action upon the only right that does exist. Likewise, if there are in fact two inconsistent rights and an action is brought on one under a mistake of fact and discontinued upon obtaining knowledge of the facts, there will be no election and the other inconsistent right may afterwards be proceeded upon, provided there are no elements of an estoppel in pais, as, for instance, prejudice to the other side. In the present case the plaintiff might have elected to rely on the right of property in itself under a conditional sale by bringing any one of several actions, as, for instance, replevin, trespass, detinue, etc., or it might have manifested its election to proceed on the theory of an absolute sale and property in the vendee by bringing a lien suit or an action of assumpsit accompanied by attachment, etc., or it might have brought an action which would be consistent with either right and not amount to an election, as, for instance, a simple action of assumpsit for the purchase price. Under some circumstances a mere action of assumpsit would show an

election, but not in this case because of the special provisions of the contract. See former opinion and cases there cited. Also *Typograph Co. v. Macgurn*, 119 Mich. 533. These principles are set forth more fully in the former opinion and cases there cited, and also in 15 Cyc. 251 et seq., and numerous recent cases there cited, which volume has been received since the former decision was rendered. The following quotations are from this volume:

"An election of remedies is the choice by a party to an action of one of two or more coexisting remedial *rights*. . . . All actions which proceed upon the *theory that the title to property remains in plaintiff* are naturally *inconsistent with those* which proceed upon the *theory that title has passed to defendant*. But there is no inconsistency between different legal remedial *rights*, all of which are based upon claim of title to property in plaintiff or all of which are based upon the affirmance of title in defendant. . . . The prosecution of one remedial *right* to judgment or decree, whether the judgment or decree is for *or against plaintiff*, is a decisive act which constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial *rights*. . . . By preponderance of authority the *mere commencement of any proceeding to enforce one remedial right*, in a court having jurisdiction to entertain the same, is such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial *rights*. . . . In order to constitute a binding election the party must at the time the election is alleged to have been made have knowledge of the facts from which the coexisting, inconsistent remedial *rights* arise. . . . A person who prosecutes an action or suit based upon a remedial *right* which he erroneously supposes he has, and is defeated because of the error, has not made a conclusive election, and is not precluded from prosecuting an action or suit based upon an inconsistent remedial *right*. . . . An election once made, with knowledge of the facts, between coexisting remedial *rights* which are inconsistent is irrevocable and conclusive, *irrespective of intent* [*Clausen v. Head*, 110 Wis. 405], and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial *right* inconsistent with that asserted by the election." The italics are ours.

The plaintiff contends that the election was merely between the remedy by replevin and the remedy by lien suit and that since, as it contends, the lien suit would have been ineffectual, there could not have been an election because there were not two remedies to elect between. But, as shown above, the question is whether there were two or more inconsistent remedial rights, not whether, if there were two such rights, a particular proceeding adopted by the plaintiff to enforce one of them would have been successful. Even if the lien suit had been carried to completion and had failed of success there might still have been an election. See above quotation; also *Renne v. Townsend*, 100 N. W. (Ia.) 48; also *Hickman v. Richburg*, 122 Ala. 638, cited in the former opinion, holding that the bringing of a materialman's lien suit, even though it must necessarily have been ineffectual, amounted to an election and an abandonment of the title reserved on the sale.

It is true that there is more or less confusion in the books in the use of the words "remedies" and "rights" in connection with the doctrine of election, but in general it will be found upon an examination of the cases that where it is held that no election has been made, either there was in fact no right, although one was supposed to exist, for the enforcement of which the action claimed to manifest an election was instituted, or if there was such a right the action was instituted under a mistake of fact, or proceedings were brought on two or more inconsistent rights at the same time, in which case, of course, there was no election. Still, most of the cases speak of rights or causes of action as distinguished from mere forms of action. For instance, in *Snow v. Alley*, 156 Mass. 193, upon which the plaintiff relies, the court, by Mr. Justice Holmes, said:

"Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice.

. . . But the fact that a party wrongly supposes that he has two such rights and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that."

In *Butler v. Hildreth*, 5 Met. 49, cited in *Snow v. Alley*, the court said, by Chief Justice Shaw:

"The assignee has an election, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other. This results from the plain and very obvious consideration, that the assignee cannot affirm the sale in part and disaffirm it in part; if it is to stand as a valid sale the property of the goods remains vested in the purchaser and he remains liable for the price. But if the sale is avoided and set aside, it stands as if it had never been made. . . . What action on the part of the assignee is to be taken as proof of his election? . . . We think that if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale but by necessary implication affirms it."

It thus seems that there may be an election not only when the action instituted has not been carried to completion but also when it has been carried to completion unsuccessfully. It is unnecessary, as intimated in the former opinion, to say definitely whether the lien suit could have been carried to completion successfully or not, and in *Johnson-Brickman Co. v. Mo. Pac. R. Co.*, 126 Mo. 344, cited by the plaintiff, it was held that where the action was not carried to completion neither the trial court nor the appellate court could determine whether it could have been carried to completion with success,—although the court gave this as one of the reasons why it should hold, as it did, that the commencement of an action accompanied by an attachment, if not carried to judgment, would not amount to an election so as to prevent a subsequent action of replevin, which ruling it must be conceded is contrary to the views expressed in our former opinion, but which also in our opinion is contrary to the great weight of authority and to cases referred to by that court and is based upon a confusion as to rights and remedies and upon the idea that to constitute an election there must exist facts amounting to an estoppel in pais. Election differs from the various classes of estoppel and rests on the principle that one cannot occupy inconsistent positions. Whether

the conclusion reached by that court was nevertheless correct on the ground that the first suit was brought under a mistake of fact no opinion need be expressed.

The petition for a rehearing is denied. .

Kinney, McClanahan & Cooper, S. H. Derby and C. A. Galbraith for plaintiff.

J. W. Cathcart and Castle & Withington for defendant.

CONCURRING OPINION OF HARTWELL, J

The decision in this case was based upon the theory of a conditional sale, although the court did not say that they regarded the transaction as of that nature. It is only on the theory that the sale was conditional that the question of election can arise.

The facts are as follows: February 12, 1900, the plaintiff agreed to "furnish" to the Kona Sugar Co. and the company agreed to accept in Honolulu certain railway material and equipment at stated prices to be delivered at stated times upon payment of drafts accompanying bills of lading. This agreement was not executed, as the drafts were not paid and the property remained for many months in the plaintiff's possession in Honolulu.

March 13, 1901, the plaintiff agreed with the company that upon payment on the following day of \$10,000 with the company's promissory note for \$37,044.53 payable in six months with interest at $7\frac{1}{2}$ per cent., secured by its first mortgage bonds of that amount it would deliver to the company "the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms." This was done and the plaintiff "released the bills of lading from the drafts," the railroad equipment "was removed from Honolulu to Kona and the railroad of the Kona Sugar Co. was con-

structed." The note was not paid September 14, 1901, when due or afterwards. February 17, 1902, a receiver of the company was appointed who took possession of its property and carried on the business of its plantation, the company "continually getting deeper into debt and becoming more and more hopelessly insolvent." May 12, 1902, the plaintiff filed in the circuit court a notice of its lien on the railroad equipment and August 1, 1902, nearly a year after the note was defaulted, brought suit against the company and its receiver to enforce the lien, which in January, 1903, it discontinued, and afterwards brought this action of replevin.

By the second agreement the property remained the plaintiff's subject to payment of the note at maturity, upon the happening of which event the company would have become its owner. Upon non-payment of the note the plaintiff had the undoubted right to claim the property as its own and the equally undoubted right, notwithstanding the non-payment, to hold the company as a purchaser, in the latter case treating the agreement as executed instead of executory, but the two rights being directly inconsistent with each other, both of them could not be exercised either concurrently or successively.

The civilians would have applied to this case the maxim "*allegans contraria non est audiendus*," meaning that a man shall not be permitted to "blow hot and cold." If when the plaintiff brought this lien suit it knew that the bonds it held as collateral security for the unpaid purchase money were absolutely of no value, as afterwards was shown, then as a matter of common business sense it would have claimed the property as its own and as not sold to the company, and would not have claimed that it was sold as was necessary to do in bringing a lien suit. It is to be inferred therefore that the plaintiff then considered that it was for its interest to treat the company as a purchaser in order to get some benefit from the bonds. There was no other possible reason for a lien suit, for if successful it could only have secured to the plaintiff a judgment which would be a preferred claim on the company's plantation;

whereas by claiming that the property was unsold it was the property and nothing else which was obtained. Later on, when no other change had occurred in conditions than resulted from the evident worthlessness of the bonds, the plaintiff discontinued its lien suit and claimed then for the first time that under the agreement the property had not been sold. The reason of the rule expressed in the maxim above cited is that when a right may be acquired by asserting it and by such assertion is acquired, the assertion cannot be withdrawn in order to establish an inconsistent right. The lien suit was a formal avowal made in court of the plaintiff's election to treat the transaction as a sale, and it was in no other way than by such avowal or its equivalent that the transaction could have become a sale. On principle it might seem that if the plaintiff simply sent to the Kona Sugar Co. a letter stating that it would hold it liable as a purchaser, this would have been an unequivocal exercise of its right to regard the property as sold, and would suffice to vest in the plaintiff the rights of a seller, and in the company the right as well as the liability of a buyer, which rights the plaintiff could not afterwards change to suit its convenience. The cases, however, do not appear to go to that extent, although *Woodley v. Coventry*, 2 H. & C. 164, very nearly does so. In that case the defendants had sold 350 barrels of flour, to be taken from a larger quantity, to one Clarke who obtained advances of the plaintiff on the security of the flour and gave the plaintiff a delivery order on the defendants. The plaintiff sent the order to the defendants' warehouse and left it there, the clerk saying "It is all right." The plaintiff sold the flour to different persons and the defendants delivered part, but Clarke becoming bankrupt, refused as unpaid vendors to deliver any more. The plaintiff brought trover and it was contended for the defendants that by their contract with Clarke no property had passed, because the sale was not of any specific flour. The court held that the defendants were estoppel from denying that the property had passed.

If a vendor proposes to reclaim property on the ground that it is forfeited to him for non-payment of purchase money his claim should be made clearly and seasonably, and any act of his from which the buyer might properly infer that he did not claim the forfeiture would be an act beyond his recall. Non-performance of the condition subsequent would not per se work a forfeiture, but only upon the vendor's assertion that he claimed it. The condition once waived cannot be revived. But in the case of an executory agreement to sell, the property to pass to the buyer only upon his performance of a condition precedent, namely, upon payment, non-payment does not per se work a forfeiture of any right acquired by the intending buyer, for his only right is to acquire the property upon paying for it.

But in the one case as in the other, unequivocal words or conduct of the seller showing that he does not treat the property as forfeited or as unsold, and does treat it as sold, would preclude him from afterwards setting up the inconsistent claim that he owned the property and had not sold it. The plaintiff having exercised its option of affirming the transaction as a sale cannot disaffirm its own act.

I concur in the opinion of the court that the case ought not to be reheard.

TERRITORY OF HAWAII *v.* WILLIAM McCANDLESS.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

ARGUED MAY 2, 1905.

DECIDED MAY 9, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

OBSTRUCTION OF HIGHWAY—*proof.*

The trial judge dismissed the plaintiff's bill to restrain the respondent from obstructing a highway by a fence cutting off a portion of the highway, regarding the evidence as not justifying him in saying that the fence was in the highway. Held: The burden being upon the complainant to prove that the enclosed space was part of the road, the decree dismissing the bill cannot be reversed without taking a different view of the accuracy of the plaintiff's testimony than was taken by the judge who heard it. The decree is affirmed, but without prejudice.

ID.—*practice.*

Dismissing a bill on close of plaintiff's case before defendant presents or rests his case is not correct practice in equity.

OPINION OF THE COURT BY HARTWELL, J.

This was a bill in equity to restrain the respondent from obstructing a highway in Honolulu from King street to the rice mill of Y. Ah Hin by a fence cutting off a portion of the highway "150 feet in length and varying in width from ten feet to fifteen feet." The judge in dismissing the bill said: "The evidence shows in this matter that there has been some sort of way for a great many years, perhaps since about 1865 or 1866, but it does not very clearly show the location of the road, nor the width, except as to the use of it." After remarking that the width of the Achi lane "which is that portion of the road lead-

ing into the road in question" was substantially the same as the road in question, and that the plan in evidence showed that between the actual roadway and a ditch there was a strip in some places two or three feet wide, in one or two places four feet and in one place five feet, he thought it would be perfectly reasonable to regard the ditch as the margin of the road, and that the fact that it was not in very good condition would not necessarily lead to the conclusion that it was no part of the highway. He observed that the strip if added to what is actually used as a roadway would make a road "as wide or wider than the portion of the road in the Achi lane," a witness for the plaintiff stating that "it was practically the same." Therefore he declared that the evidence did not justify him in saying that the fence was in the highway, reaching his conclusion after personal inspection of the premises.

The plaintiff's brief claims that "evidence showed that for many years the way had been traveled and accommodated two or three hundred people; that it was used for carriages and foot," that before 1888, although it had not been worked, it extended ten to fifteen feet from the present fence to the old posts and was twenty-five to thirty feet wide. In 1885 Achi and others widened the road below with respondent's consent, raising it about three feet and grading it about twenty feet wide. Ah Hin graded the road six or seven times and in 1890 respondent joined in his petition to the legislature to reimburse him for that work. About that time the railroad laid a track, partly on the graded portion and partly beyond, and for a short time occupied it. After the tracks were removed the road was traveled its full width up to the posts, although the evidence varies as to where most of the travel was. In 1904 the respondent built this fence, enclosing a large portion of the traveled portion of the road, leaving a road space from seventeen to twelve feet wide. Two teams could pass before the fence was built, but cannot now pass at all places.

It is the contention of the plaintiff that the above statement of facts is supported by undisputed testimony, and that as the

judge dismissed the bill before the defendant presented his case the plaintiff's evidence should be taken as true, as in case of a demurrer. We cannot take this view of the evidence or of the practice. Evidently the trial judge did not take the plaintiff's evidence as either accurate or true. It was perhaps unfortunate that he permitted the defendant to withhold presenting his case until learning whether his motion to dismiss the bill would be granted. However that may be in law, the practice is unknown in equity. The plaintiff having in the opinion of the judge who heard the case failed to sustain the burden of proving that all or any defined portion of the enclosed space was part of the road, and the bill having therefore been dismissed, we cannot reverse that decree without taking a different view of the accuracy of the plaintiff's testimony than was taken by the judge who heard it. He and not this court has seen and heard the witnesses, observed their order of intelligence, bearing, manner of answering, whether evasively or effusively, and all those signs by which an observant listener accustomed to hearing and weighing evidence discerns truth from falsehood, accuracy from exaggeration.

We do not feel at liberty upon the showing now made to set aside the decree appealed from, which is accordingly affirmed, but without prejudice to the plaintiff's right to bring such further proceedings as shall be advised.

Castle & Withington for complainant.

J. A. Magoon and J. Lightfoot for respondent.

FIRST NATIONAL BANK OF HAWAII v. J. S. GAINES,
J. M. McCHESNEY AND ALICE McCHESNEY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 3, 1905.

DECIDED MAY 10, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN
PLACE OF WILDER, J.

HUSBAND AND WIFE—*assignment of leasehold—contract—gift—married
women's act of 1888.*

An assignment of a leasehold may be made by husband to wife, being in the nature of a gift, and not a contract within the purview of the statute, section 2252, Rev. Laws precluding contracts between husband and wife. The Married Women's Act of 1888, Sec. 2251, Rev. Laws, has the effect of destroying the common law fiction of the unity of husband and wife. The failure to record the assignment does not invalidate it as against subsequent creditors.

OPINION OF THE COURT BY HARTWELL, J.

This was an action of ejectment to recover possession of certain leasehold premises of which the plaintiff became purchaser April 11, 1904, at an execution sale on a judgment against J. M. McChesney and R. W. McChesney, surviving co-partners doing business as M. W. McChesney & Sons. J. M. McChesney having a lease of the premises for seventeen years from August 1, 1895, at an annual rental of \$175 with privilege of extension for thirteen years at \$200 a year, assigned the lease to his wife Alice McChesney August 20, 1901, "subject to the payment of the rents and taxes as therein provided." The assignment was acknowledged by McChesney March 11, 1904, and

recorded April 11, 1904, the writ of execution having been issued March 11, 1904, on which the sale was made to the plaintiff. The defense was that the defendant Alice McChesney was entitled to the possession of the premises, but on the plaintiff's objection that the husband could not convey directly to the wife, and that the assignment was not recorded until after levy of the execution the court declined to admit the evidence of the assignment and directed a verdict for the plaintiff. The sole question presented to this court is whether the assignment was valid in law as against subsequent creditors.

The defendants' contention is that the Act of 1888, section 2251, Revised Laws, giving a married woman power to "receive, receipt for, hold and manage property real and personal as if she were sole," enabled the defendant Mrs. McChesney to take and receive her husband's assignment of the leasehold as a gift, and that the provision of section 2252, Revised Laws, that "a married woman may make contracts in the same manner as if she were sole except that she shall not be authorized hereby to contract with her husband" is inapplicable, the transaction in question not being a contract within the meaning of this provision.

The plaintiff's claim is thus expressed: "According to the strict rules of the old common law the wife is not permitted to take and enjoy either real or personal property independent of her husband." By section 2251 of the Revised Laws "a married woman is free from the restraints of the common law which regarded unity of husband and wife in so far as it enabled her to hold property separate and apart from her husband, but it did not free the husband and wife from the restraints of the common law of contracting and conveying to each other. It was still the intention of the legislature that the common law theory that the husband should not convey or deal with the wife should not be changed by statute." The assignment of the lease by McChesney to his wife was an executed contract.

The plaintiff's claim cannot be sustained. The statutory capacity of a married woman to take, hold and receive property

to her separate use is inconsistent with the common law fiction of the unity of husband and wife as well as with the former statute giving the husband by virtue of marriage his wife's personal property. The relations between husband and wife unless as affected by the statute of 1892 on the subject of the common law are statutory in the law of Hawaii. "As the laws have destroyed this unity the incidents or consequences of the unity ought not to operate." *Butler v. Ives*, 130 Mass. 202. The only reason suggested why the wife should not take and hold a gift from her husband is that a gift implies a contract of offer and acceptance; but the theory of contract is not applied to gifts causa mortis which were good at common law. *Whitney v. Wheeler*, 116 Ib. 490; nor to gifts not revoked during the husband's life time which are good as against his legal representatives although not as against his creditors. *Stimpson v. Achorn*, 158 Ib. 346. Gifts from husband to wife are sustained in equity if creditors' rights do not intervene. *Jones v. Clifton*, 101 U. S. 225; Schouler's Dom. Rel., Sec. 189. Such gifts are sustained in law in Connecticut, New York and Vermont by decisions which appear to be based upon married women's statutes no broader than our own. *Wheeler v. Wheeler*, 43 Ct. 507; *Armitage v. Mace*, 96 N. Y. 538; *Fletcher v. Wakefield*, 54 Atl. Rep. 1012 (Vt.)

We do not regard the assignment made by McChesney to his wife in this case as a contract within the purview of the statute. "A gift completed and executed has none of the elements nor the properties of a contract and does not come within the prohibition of the statute," being a statute providing that contracts made on Sunday are void. *Wheeler v. Glasgow*, 11 So. 758 (Ala.). The failure to record the assignment does not invalidate it as against subsequent creditors. *Jones v. Clifton*, ubi supra; *Clark v. Killian*, 103 U. S. 766.

The exceptions are sustained, the judgment reversed and the case remanded for further appropriate proceedings.

Smith & Lewis for plaintiff.

J. W. Cathcart for defendants.

WONG HOON KAN *v.* LUI YAN.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

SUBMITTED MAY 8, 1905.

DECIDED MAY 10, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EXCEPTIONS. EVIDENCE—*objections other than those made at trial, not considered on appeal.*

When the only objection made in the trial court to a question in regard to the plaintiff's reputation was that the witness had not qualified to testify on that subject, other objections made to the form of the question for the first time on the appeal will not be considered.

Id.—*responsiveness of answer.*

In an action for malicious prosecution, it is not error to refuse to strike out as not responsive an answer that the plaintiff's reputation was good before his arrest—to a general question as to what his reputation was.

Id.—*harmless error, facts otherwise proved.*

It is not reversible error to allow an improper question when the facts to prove which the question was asked are otherwise proved.

DIRECTING VERDICT—at close of plaintiff's case, defendant not resting.

It is not reversible error to refuse to direct a verdict for the defendant at the close of the plaintiff's case, even though the plaintiff has not made out his case, unless the defendant rests.

OPINION OF THE COURT BY FREAR, C.J.

This was an action in the circuit court for a malicious prosecution of the plaintiff on a charge of burglary in the second degree upon the complaint of the defendant in the district court of Hamakua, which prosecution was terminated by the entry of a nolle prosequi. The plaintiff obtained a verdict for \$300 and

the defendant brings the case here upon eleven exceptions, all of which, except those referred to below, are expressly abandoned.

Exception 2 was taken to the allowance of a question put to one of the plaintiff's witnesses in regard to the plaintiff's reputation. The witness had testified that he had lived in Hamakua eleven or twelve years and had known the plaintiff, who also lived in Hamakua, about eight years, and had replied affirmatively to the question, "Do you know the reputation of Wong Hoon Kan in the community in which he lives?" He was then asked, "What is that reputation?", to which objection was made on the ground that the witness had not qualified. The question is objected to now on the ground that it called merely for the reputation and not for the general reputation of the plaintiff, and that, since the evidence would be admissible, as contended, only as tending to show that the defendant acted without probable cause, the question was not framed, as it should have been, so as to include knowledge on the part of the defendant of the plaintiff's good reputation. The objection made in the trial court was not well founded and the objections now made in this court cannot avail, even if well founded, for the reason that they were not made in the trial court.

Exception 3 was taken to the refusal to strike out the answer given to the question objected to under exception 2, on the ground that it was not responsive, the answer being "Before he was arrested, he had a good reputation." Although the question in form related to the present, it was of a general nature and was evidently intended to refer to the plaintiff's reputation in general or prior to, or irrespective of the effect of, the arrest and not merely to the time subsequent to the arrest. The answer was within the scope of the question as it was evidently intended and was in itself entirely competent.

Exception 4 was taken to the allowance of the next question, which was: "What is his reputation now after the arrest?", to which objection was made solely on the ground that the witness

had not been shown qualified to testify upon the subject. This exception is disposed of by the ruling upon exception 2 above.

Exception 5 was taken to the allowance of a question put to another witness of the plaintiff, as follows: "As sheriff of the Island of Hawaii I will ask you whether or not it becomes one of your duties to receive from the magistrates complaints having been filed in our courts and whether or not you are under bond to retain these complaints, to keep them?" which question was objected to on the ground that the law provides what the district magistrates shall do with the papers. This question was put apparently as tending to show, along with other evidence, that a document produced by the witness was the warrant under which the plaintiff was arrested—for the purpose of showing the plaintiff's arrest upon the defendant's complaint. If it was error to allow this question, the error was harmless, for the issuance of the warrant and the arrest of the plaintiff on defendant's complaint were fully shown otherwise. The defendant himself testified that this warrant was issued and that the plaintiff was arrested, and the witness to whom this question was put testified that he received the document through the mail from the deputy sheriff of Hamakua, and that what purported to be the signatures of the deputy sheriff and of the district magistrate upon the warrant looked like the signatures of those officers, with which the witness was familiar.

Exception 8 was taken to the denial of defendant's motion for a directed verdict at the close of plaintiff's case based on the ground that the plaintiff had failed to show probable cause and malice. Even if the plaintiff had failed to show probable cause and malice and a verdict might properly have been directed for the defendant at that stage of the case, it was not reversible error to refuse to do so, the defendant not having rested. When the motion was denied the defendant proceeded with his case and put on evidence upon his part. That amounted to a waiver of the exception. As stated in *Walker v. Windsor Nat. Bnk.*, 56 Fed. 78, "This court cannot be required to take cognizance of the exception to the refusal to direct a verdict for

defendants before they had rested their case. * * *

Neither party can except to what is not a matter of right, and it is not a matter of right according to the common law to ask the court to sum up to the jury, until the evidence is closed.

* * * Moreover, the patience of the court cannot be demanded twice on the same proposition,—once at the close of the plaintiff's proofs, and again at the close of defendant's." These views have been held repeatedly. The following are a few of the cases: *Sigafus v. Porter*, 179 U. S. 121; *Columbia R. Co. v. Hawthorne*, 144 U. S. 206; *Fulkerson v. Chisna M. & I. Co.*, 122 Fed. 784; *Louisville Etc. R. Co. v. Hendricks*, 13 Ind. App. 13; *Bopp v. N. Y. E. V. T. Co.*, 177 N. Y. 34; *Wetherbee v. Potter*, 99 Mass. 359; *Barabasz v. Kabat*, 91 Md. 59 (46 Atl. 339); *Thompson v. Avery*, 11 Utah, 223; *Moreley v. Ins. Co.*, 85 Mich. 217.

The exceptions are overruled.

M. T. Furtado for plaintiff.

A. S. Humphreys for defendant.

LEE AHLO v. ROYAL INSURANCE COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED MAY 5, 1905.

DECIDED MAY 11, 1905.

FREAR, C.J., HARTWELL, J., AND CIRCUIT JUDGE LINDSAY IN
PLACE OF WILDER, J.

FIRE INSURANCE—loss by fire ordered by board of health—proximate cause—evidence of value.

The plaintiff's buildings had been destroyed by fire pursuant to an order of the board of health based on the alleged fact that they were infected. The plaintiff's evidence of value showed the

original cost in 1878 and 1879, their rental value and generally described their material, repairs and condition. Held: The case is within the rule in *Akwai v. Ins. Co.*, 14 Haw. 533. The proximate cause of the loss was the fire; the buildings were not valueless because condemned to be burned. In the meaning of the policy the intrinsic value of the buildings was insured. The evidence of value was sufficient in law, coming within the rule in *Kwong Lee Yuen v. Manchester Ins. Co.*, ante p. 685.

OPINION OF THE COURT BY HARTWELL, J.

This was an action on a fire insurance policy to recover the value of the plaintiff's insured buildings which were consumed by fire pursuant to an order of the board of health based on the alleged fact that they were infected with bubonic plague germs. The court, jury having been waived, gave judgment for the plaintiff in the sum of \$3,000, the amount of the insurance. The matters of defense on which many of the defendant's exceptions are based were (1) That the loss was caused not by the fire, but by the order of the board, and (2) That from the time the order was made and by reason or in consequence of the order the buildings became valueless. The defendant contends that the rule in *Akwai v. Ins. Co.*, 14 Haw. 533, does not apply because in that case no order had been made by the board to carry into effect its resolutions that all the buildings were infected in the block in which the insured buildings were situated, and therefore should be destroyed by fire, while in the present case the plaintiff's buildings were ordered to be burned, so that, as the defendant claims, the order was the direct proximate cause of the loss and the fire merely incident; and also whether this contention is sustained or not, that buildings so condemned to destruction were valueless.

This contention cannot be sustained. The buildings were insured against loss by fire and they were lost by a fire resulting from no cause excepted by the policy. The value of an insured building at a time when an adjoining building is burning may be so much lessened by the danger or certainty that the

fire will spread that no one will pay anything for it, and yet to hold that its insured value is correspondingly diminished or by reason of the imminent danger has ceased to exist would have the effect of frustrating the purpose of the insurance and of nullifying the value of the policy. In the meaning of the policy the intrinsic value of the buildings was insured. The exceptions relating to this portion of the defense are not sustained.

The defendant's remaining exceptions rest upon its claim that the plaintiff did not show the value of the buildings at the time of their loss in 1900 by his evidence of their original cost in 1878 and 1879, their rental value and general description as to material, repair and condition. The evidence was sufficient in law, the case in this respect coming within the rule in *Kwong Lee Yuen v. Manchester Ins. Co.*, ante, p 685.

The exceptions are overruled.

Castle & Withington and *W. A. Whiting* for plaintiff.

A. G. M. Robertson for defendant.

R. C. A. PETERSON *v.* E. S. CHURCH.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED MAY 2, 1905.

DECIDED MAY 22, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

REAL ESTATE BROKER—*evidence of authority.*

Evidence held sufficient to warrant a finding that plaintiff was employed to act as a broker for defendant in negotiating the sale of defendant's property.

PRINCIPAL AND AGENT.

A sale of land made by an agent on different terms from those authorized by his employer will not bind the latter to pay for the services of the former.

An agent's power to sell a piece of land which is mortgaged, the purchaser to assume the mortgage, does not authorize the agent to bind his principal to convey by a warranty deed.

Where an agent makes a contract which is unauthorized in one particular the mere fact that the principal, in repudiating it, gives as his reason that it is unauthorized in another particular, in which, however, it is authorized, does not constitute a ratification where the third party is in no way injured by the form of the principal's objection so as to raise an estoppel.

OPINION OF THE COURT BY WILDER, J.

This was an action of assumpsit to recover from defendant the sum of \$375 for services alleged to have been performed by plaintiff for defendant as a real estate broker in negotiating a sale of defendant's house and lot. After a verdict for plaintiff defendant moved for a new trial, which was denied. The case comes to this court on three exceptions of defendant, the others being expressly waived. These three exceptions are (1) that the trial court erred in giving inconsistent, confusing and contradictory instructions to the jury; (2) that the uncontradicted evidence in the case shows that plaintiff was never employed to act as the agent or broker of defendant in negotiating the sale of her property; and (3) that the verdict was contrary to the law and the evidence.

We will first consider the second exception. All that this court can do is to ascertain from the record whether or not there was any evidence beyond a scintilla which would justify the jury in finding as they did. An examination of the transcript and exhibits satisfies us that this exception is without merit. There was evidence tending to show that after some preliminary negotiations between plaintiff and defendant's husband as to the leasing and selling of defendant's home, of which defendant had some knowledge, in response to a request from plaintiff to defendant over the telephone to have defendant's husband send to plaintiff in writing the terms and particulars of the sale of defendant's place, defendant replied that she would

do so; and that defendant's husband thereupon, in compliance with such request, sent the particulars in writing to plaintiff, although defendant afterwards claimed that there was a misunderstanding as to the price mentioned. This was sufficient to warrant the jury in finding that plaintiff was employed as a broker to negotiate a sale of defendant's property.

The third exception of the defendant is that the verdict was contrary to the law and the evidence. It is claimed that the terms of the sale as arranged by plaintiff with the purchaser were completely at variance with the terms which defendant had authorized. Defendant's terms were contained in the following letter to plaintiff from her husband:

"Waialua, Oahu, March 21, 1904.

"R. C. A. Peterson, Esq.,

"Honolulu, T. H.

"Dear Sir:—Replying to your telephonic message of this date relative to my wife's house on Kewalo St. would say that we have leased same to Mr. Charles Forster of the California Feed Co. at \$60.00 per month and while I have not as yet actually executed a lease to him yet I purpose protecting him to the same extent as if such a lease had actually been recorded. There is as you know a mortgage of \$3500 on the property held by Mr. Tom May—this would of necessity have to be assumed by any purchaser. The property as it stands cost me fully \$10,000 cash and I am assessed upwards of that amount. My wife will take \$4000.00 cash purchaser assuming mortgage as above, or \$4500, \$2000 cash and balance on time, always providing that a lease of at least six months be given Mr. Forster. Trusting that my position is sufficiently clear, I remain, very truly yours,

(Signed) "F. J. CHURCH."

The terms upon which the purchaser agreed to buy were contained in the following receipt:

"Honolulu, Mar. 26, 1904.

"Received from F. B. Whitin, of Whitinsville, Mass., the sum of Two Hundred Dollars, being first payment on purchase price (\$7500) of Mrs. F. J. Church home situate on Kewalo Street, containing 27,200 sq. ft. Balance \$7300.00 to be paid on delivery of warranty deed, free of all incumbrances, prop-

erly executed and stamped. Said deed to be executed and delivered by the 8" day of April, 1904.

(Signed) "R. C. A. PETERSON."

It is well settled that a sale of land made by an agent on different terms from those authorized by his employer will not bind the latter to pay for the services of the former even although the terms are more advantageous than those called for by the employer. *Nesbitt v. Helser*, 49 Mo. 383; *Hamlin v. Schulte*, 31 Minn. 486; *Williams v. McGraw*, 52 Mich. 480.

In the case at bar the contract made by plaintiff with the purchaser differed in three particulars from the terms authorized by defendant, namely, as to the lease to the Forsters, as to the mortgage held by Mr. May, and as to a deed with covenants of warranty. The variance as to the lease is immaterial because that was only put in for the benefit of the tenants then in possession and plaintiff had made satisfactory arrangements with them. Defendant authorized a sale for \$4000 cash, the purchaser to assume a mortgage of \$3500. The purchaser paid \$200 and agreed to pay \$7300 on delivery of a warranty deed, but said nothing about the mortgage. If the mortgage was due or if the mortgagee was willing to release then it would have been substantially the same, but the plaintiff would have to show that, and as he has not done so it follows that there was a fatal variance in this particular. There was also a fatal variance in the matter of a warranty deed. The purchaser only agreed to pay the balance of the purchase price "on delivery of a warranty deed free from all incumbrances." As there was a mortgage on the place defendant could not have intended to convey by a warranty deed, and plaintiff exceeded his authority in attempting to bind her so to do.

But plaintiff claims that defendant in refusing to consummate the sale on the ground of the insufficiency of the price thereby waived the variance in the other particulars. The only ground of objection raised being untenable, the question is whether defendant can set up other objections which would have been tenable. This question was settled in the case of *Hawaiian*

Agricultural Company v. Norris, 12 Haw. 229, 245, where it was held that where an agent makes a contract which is unauthorized in one particular the mere fact that the principal, in repudiating it, gives as his reason that it is unauthorized in another particular, in which, however, it is authorized, does not constitute a ratification where the third party is in no way injured by the form of the principal's objection so as to raise an estoppel.

It is unnecessary to pass on the other questions raised.

The exceptions are sustained, the verdict is et aside, and the case is remanded to the circuit court of the first circuit for such further proceedings as may be proper.

Castle & Withington for plaintiff.

A. S. Humphreys for defendant.

TERRITORY OF HAWAII v. ENOCH JOHNSON AND
JONAH KUMALAE.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

ARGUED APRIL 17, 1905.

DECIDED MAY 27, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

CIRCUIT COURT, FIRST CIRCUIT—*may be presided over by one judge.*

The provision of Act 32, Sec. 7, Laws of 1903, that there may be one or more sessions of the circuit court of the first circuit at the same time and that each session may be held by one of the judges, is not in conflict with the Organic Act.

ERROR HARMLESS—*in striking motions to quash indictment and challenges to grand jury, when same grounds covered by plea in abatement.*

If any error was committed in striking defendants' motions to quash the indictment and challenges to the grand jury from the

files, it was harmless for the reason that the grounds upon which they were based were afterwards made the subject of a plea in abatement, which was considered on its merits.

IDEM SONANS—*Winfred and Winnifred.*

When Winfred H. Babbitt appeared and served as a grand juror in response to a summons to Winnifred H. Babbitt, the variance was not fatal, as the names are within the rule of idem sonans.

INDICTMENT—*indorsed at foot instead of on back.*

The finding "a true bill" signed by the foreman of the grand jury, although at the foot instead of on the back of the indictment, is an "indorsement" within the meaning of rule 17 relating to grand juries.

CONSPIRACY—*not merged in completed offense, when latter of lower grade.*

A conspiracy to commit a criminal offense of lower grade than the conspiracy is not merged in such offense when completed.

ID.—*indictment for, when not duplicitous, though also sets forth commission of offense which was object of conspiracy.*

Although two independent offenses cannot be charged as such in the same count, it is usual and proper to set forth in an indictment for conspiracy the acts done in pursuance of the conspiracy, and it is immaterial that such acts constitute an offense, provided they are charged merely by way of aggravation or otherwise as done in pursuance of the conspiracy, and not as an independent offense.

SPEEDY TRIAL—*not denied by continuance from last week of term to next term.*

The constitutional provision for a speedy trial was not violated by a refusal to proceed at once with the trial and a continuance to the next term, when the request to proceed was made on Monday of the last week of the term, the day on which the plea of not guilty was made, and the next term began the following Monday.

PLEA OF NOT GUILTY, WITHDRAWAL OF—*for purpose of filing plea in abatement, discretionary.*

A plea of not guilty waives objections to grand jurors, and a refusal of leave to withdraw such plea for the purpose of filing a plea in abatement based on the ground that one of the grand jurors was disqualified is within the discretion of the trial court, not subject to reversal except in case of abuse.

SEPARATE TRIALS—*discretionary with trial court.*

Conspirators jointly indicted are not entitled to separate trials of right, and a refusal to allow them to be tried separately is

within the discretion of the trial court, not subject to reversal except in case of abuse.

EXCEPTIONS RE JURY LIST—*not considered, when record insufficient.*

An exception to the overruling of a motion, to quash a special venire of trial jurors based on irregularities alleged to have been made at previous terms affecting the list of names in the trial jury box, cannot be considered when the records alleged to show such irregularities are not brought to this court.

JUROS NOT DISQUALIFIED—*though having opinion requiring evidence to remove.*

A juror is not necessarily disqualified because he has an opinion which it would require evidence to remove. The question is whether he could decide fairly and impartially on the law and the evidence in the case, and that is a question largely in the sound discretion of the trial judge.

EVIDENCE, HARMLESS ERROR—*document first admitted in evidence and then excluded.*

A document having been admitted against one objection and then excluded upon another objection being presented, the error, if any, in admitting it is held to have been cured.

EVIDENCE, CONSPIRACY—*warrant paid after conspiracy.*

A warrant paid two days after the alleged conspiracy which had for its object the obtaining of the money so paid is admissible on a charge of the conspiracy.

Id.—*journal not only evidence of speeches in legislature.*

On the trial of a member of the house of representatives for conspiracy, remarks made by him in the house may be shown by the testimony of one who heard them; the house journal is not the only evidence of what was said.

Id.—*objections not presented in trial court, not considered.*

A specific objection, which was not well founded, having been made in the trial court to the admission of certain evidence, other objections, presented for the first time in this court, will not be considered.

Id.—*various matters held admissible.*

Various matters more fully set forth in the opinion are held, without stating reasons, to have been properly admitted in evidence in this case.

REMARK BY COURT—*as to testimony at former trial.*

A remark by the court in response to an objection by the defense that certain testimony had not been given at a former trial, that he thought that certain other somewhat similar testimony

referred to in an amended question put by the prosecution had been given at the former trial, is held not to have been reversible error, especially when, upon further objection that the question was not proper cross-examination, the question was disallowed.

EXCEPTIONS TO INSTRUCTIONS—*too general.*

An exception to the portion of the charge given by the court of its own motion or to the portion given at the request of the prosecution, when each such portion is made up of a number of distinct instructions which are not objected to as a whole, is too general to be considered.

EVIDENCE, CONSPIRACY—*acts in pursuance of conspiracy, admissible on question of intent.*

The commission of a gross cheat in pursuance of a conspiracy may be shown in support of the charge of conspiracy, as bearing on the question of intent.

INSTRUCTIONS, CONSPIRACY—*various instructions held properly refused.*

Various instructions requested by the defense and more fully set out in the opinion are held, without stating reasons, to have been properly refused.

ID.—*as to weight of evidence of acts done in pursuance of conspiracy.*

It is not error to refuse to instruct the jury that they should be especially careful to avoid being unduly influenced by proof of a gross cheat into the belief that a conspiracy to commit gross cheat had been proved, especially when the jury had been instructed that the defendants were charged with conspiracy alone and not gross cheat.

ID.—*inapplicable.*

Instructions which are inapplicable to the evidence, even though theoretically correct, may properly be refused.

ID.—*inadvertent error, held cured by other instructions.*

An error which was evidently made inadvertently in one instruction purporting to give the prosecution the benefit of a reasonable doubt, is held cured by other clear and correct instructions on the subject of reasonable doubt.

OPINION OF THE COURT BY FREAR, C.J.

The defendants were jointly indicted for conspiracy in substance as follows: That Kumalae, a member of the house of representatives and chairman of a special committee on the "Chinese Fund," and Johnson, an attorney, conspired to defraud

the Territory by falsely representing to the standing committee on accounts that Johnson had been engaged as clerk of said special committee and had performed certain services for it and rendered a legal opinion to it and that by reason thereof there was due him from the Territory \$312.50, and that through false representations so made they procured an approval of the bill and a warrant for the payment thereof and afterwards obtained payment thereof from the Territory. The defendants were found guilty of conspiracy in the first degree and now bring the case here on twenty-five exceptions.

The first point presented by counsel, which is presented at considerable length, is that the trial court was irregularly constituted in that it was presided over by only one of the three judges of the circuit court of the first circuit instead of by all three judges sitting together as required, according to the defendants' contention, by sections 81 and 83 of the Organic Act of the Territory, which may be considered as in the nature of constitutional provisions. This point does not seem to have been raised in the trial court or made the ground of exception. Even if it had been raised and properly brought here it could not be sustained, for it is expressly provided by Act 32, section 7, Laws of 1903, that there may be one or more sessions of the court at the same time, and that each session may be held by one of the judges. This provision is not in conflict with the Organic Act as we understand it.

The first exception was taken to an order to strike from the files the defendants' separate motions to quash the indictment and their joint challenge to the panel of the grand jury and also their amended joint challenge to the grand jury. This order was based, as we infer, upon the reason that the grounds of these motions and challenges were not proper subjects for such motions and challenges but were proper subjects for a plea in abatement. Whether this was so or not as to all of the grounds set forth it is unnecessary to say, for if there was any error in striking the motions and challenges from the files it was harmless for the reason that such grounds were afterwards made the

subject of a plea in abatement, which was considered upon its merits and to the overruling of which the next exception was taken, which will now be considered.

The second exception was taken to the overruling of the defendants' joint plea in abatement, which was based on a number of grounds, only two of which are now relied on by the defendants. One of these is that *Winfred* H. Babbitt served as a member of the grand jury which found the indictment, whereas no such name, but the name *Winnifred* H. Babbitt, was certified by the jury commissioners, written on a slip of paper, placed in the jury box, drawn from the jury box, placed in the grand jury box, drawn from the grand jury box and listed among those to be served and summoned as grand jurors. Assuming that these facts sufficiently appear in the record and that the variance in the names, if material, could be taken advantage of notwithstanding the provision of section 1795 of the Revised Laws that no person shall take advantage of any irregularity in the drawing, summoning, returning or empanelling of grand or trial jurors "unless it clearly appears that he was injured by such irregularity," we are of the opinion that the names in question are similar enough to fall within the rule of *idem sonans*. The surnames and middle initials are identical and the Christian names are of the same derivation and for the most part spelled the same way and so similar in pronunciation as to be readily understood the one for the other. They are more nearly alike in spelling and sound than many names that have been held to be within this rule in other cases. See the numerous instances given in the note to 21 Am. & Eng. Enc. of Law, 2nd Ed. 313.

The other ground of the plea in abatement is that the statement "a true bill" and the signature of the foreman of the grand jury thereto at the foot of the indictment is not an "indorsement" within the meaning of Rule 17 of the supreme court relating to grand jurors, the contention being that the word "indorsement" means, as shown by etymology and usage, an entry "on the back." It seems to us that the statement and signature in question are an indorsement within the meaning of

the rule. *Williams v. State*, 9 Mo. 270; *State v. Jones*, 2 Kan. App. 1 (42 Pac. 392).

Exception three was taken to the overruling of the defendant's demurrer to the indictment based upon the grounds (1) that the indictment was duplicitous in that it charged two separate offenses, namely, conspiracy to commit gross cheat and gross cheat itself and (2) that it failed to state any offense known to the law.

The indictment, which is somewhat lengthy, sets forth the conspiracy and then after the words "in execution and pursuance of the said combination, mutual undertaking and concerting together" the acts which were the object of the conspiracy and concludes "and so in manner and form aforesaid at the time and place aforesaid, the said Enoch Johnson and Jonah Kumalae did unlawfully, feloniously, maliciously and fraudulently combine and mutually undertake and concert together to cheat and defraud the Territory of Hawaii of the sum of three hundred and twelve dollars and fifty cents of the moneys and property of the Territory of Hawaii, and did then and there and thereby commit the crime of conspiracy in the first degree, contrary to the form of the statute in such case made and provided."

There was no merger of the conspiracy in the offense which was the object of the conspiracy. When a conspiracy is of a lower grade, as, for instance, a misdemeanor, and the overt act is an offense of a higher grade, as, for instance, a felony, there is some difference of opinion as to whether the former is merged in the latter, although the prevailing view at present seems to be that there is no merger. When a conspiracy and the overt act done in pursuance of it are offenses of the same grade, as, for instance, when they are both misdemeanors, it is settled that there is no merger. And a fortiori when, as in this case, the conspiracy is of a higher degree than the overt act which is its object it is clear that there is no merger. 4 Cyc. 643, 644; *State v. Setter*, 57 Conn. 461; *King v. Thornton*, 4 Haw. 45.

It is true, as contended by the defendants, that "a defendant

cannot be charged in one and the same count with two or more independent offenses, as such, subject to different penalties." (10 Enc. Pl. & Pr. 532; *King v. Jones*, 3 Haw. 330), but, although unnecessary, it is proper and indeed more usual in indictments for conspiracy to set forth the overt acts, if any, done in pursuance of the conspiracy, and it is immaterial whether such acts happen to constitute a criminal offense or not so long as they are set forth merely as acts done in pursuance of the conspiracy and not as independent offenses. In such case the gist of the offense alleged is the conspiracy and not the acts which were the object of the conspiracy. The acts are set forth by way of aggravation and not as matters of substance. Whether they are set forth as matters of aggravation or by way of helping out the charge of conspiracy in point of particularity or are mere surplusage on the one hand or are set forth as independent offenses on the other is a matter of construction of the indictment. The indictment in question taken as a whole shows clearly that it was intended as an indictment for conspiracy and not of gross cheat or of conspiracy and gross cheat and the trial proceeded on that theory. See *U. S. v. Gardner*, 42 Fed. 829; *U. S. v. McDonald*, 26 Fed. Cas. No. 15,670; *State v. Grant*, 86 Ia. 216; *State v. Bradley*, 48 Conn. 535; *Commonwealth v. McHale*, 97 Pa. St. 397; *Commonwealth v. Davis*, 9 Mass. 415; *People v. Arnold*, 46 Mich. 268; *Commonwealth v. Ward*, 92 Ky. 158 (17 S. W. 283); *Dealy v. U. S.* 152 U. S. 546; *King v. Thornton*, 4 Haw. 45; *King v. Asina*, 3 Haw. 474.

In support of the second ground of the demurrer it is contended that no prejudice could result to the Territory and no offense could be committed against the Territory through the presentation of a fraudulent bill to the committee of the house of representatives on accounts for the reason that both as matter of law and under the allegations of the indictment such committee had no authority to approve accounts unless they were true and correct. This argument is so entirely without merit as to need no refutation. It was the very falseness and incorrectness of the bill and its false representation as true and

correct that was prejudicial to the Territory and that made the act a criminal offense.

The fourth exception was taken to the refusal of the defendants' request to proceed with the trial and to the continuance of the case until the next term of court, which rulings were made after the defendants had pleaded to the indictment on the day on which the demurrer was overruled. That day was Monday of the last week of the term, and the next term was to begin on the following Monday. These rulings did not amount to a denial of a speedy trial within the meaning of the constitutional provision.

The fifth exception was taken to the refusal to allow the defendants to withdraw their plea of not guilty and their demurrer and file a further plea in abatement based on the ground that one of the grand jurors was disqualified. It is contended that error was committed in this refusal particularly because the defendants had not been held to answer when the indictment was found and so had no opportunity to interpose challenges to grand jurors before the indictment was found, and because the alleged disqualification was not discovered until after the plea of not guilty. The request to withdraw the plea and demurrer and file a second plea in abatement was not made until nearly three months after the indictment was found. A plea of not guilty is a waiver of the right to object to the competency of grand jurors, and a refusal to allow a withdrawal of such plea for the purpose of raising such objections is at most a matter within the discretion of the trial court, not subject to reversal upon exceptions except in case of abuse, and no abuse appears in this case. See *Reed v. Commonwealth*, 98 Va. 821 (36 S. E. 400); *People v. Allen*, 43 N. Y. 28; *State v. Boyd*, 56 S. C. 384 (34 S. E. 662); *U. S. v. Gale*, 109 U. S. 65.

The sixth exception was taken to the refusal to grant the defendants separate trials, the principal contention under this exception being that the defendants were entitled to separate trials as matter of right under section 3096 of the Revised Laws, which reads as follows: "Conspirators may be tried joint-

ly or severally. But to prevent oppression by joining parties, and thus depriving some of the testimony of others, it is provided that in the trial of any one for a conspiracy, another, charged as a co-conspirator, may be a witness, and in such case the two may be separately tried, though joined in the indictment." The motions for separate trials were made not only after the pleas of not guilty but after the first trial, on which the jury disagreed, and not until the day upon which the case had been set for second trial, nor were they supported by affidavits. They were based upon the statute and upon the representation that it was the purpose of each defendant to call the other as a witness in his behalf. It does not appear that either did call the other as a witness or that either was deprived of the testimony of the other. One of them took the stand—apparently as a witness in his own behalf. The question whether or not defendants, who are jointly indicted, should be tried together or separately is a question resting in the sound discretion of the court and the ruling of the trial court upon it cannot be disturbed except in case of abuse. *Territory v. Masagi*, ante, 205; *U. S. v. Ball*, 163 U. S. 662. The statute does not alter the rule, nor is the word "may" in the statute to be construed as "must," as contended by the defendants. There was no abuse of discretion in refusing the motions for separate trials in this instance.

The seventh exception was taken to the overruling of the defendants' motion to quash the special venire of trial jurors on the ground that the fifty names which had been drawn from the jury box and deposited in the trial jury box for the term, and from which the twenty-six names included in the special venire were drawn, had been illegally drawn and deposited for the reason that certain of said names had not been inclosed in an envelope and under seal in accordance with the provisions of section 1780 of the Revised Laws, although the persons bearing such names had attended and served either as grand or trial jurors during the September, 1903, term or the January, 1904, term or had been excused from further service at one of said terms,—the term at which the special venire was issued

being the April, 1904, term. The contention contra is that the jurors for each term in any one year should be drawn from the entire list for that year and that section 1780 does not provide that the names of those who served or were excused during one term should not be drawn at any subsequent term in the same year, and that probably that section was intended especially for circuits in which the terms of court are short and in which one term does not begin immediately after another, as in the first circuit, and that its object was to require the names of persons who had served or been excused to be sealed only until the time for drawing the venire for the next term or to prevent the drawing of such jurors on special venire during the same term; also that there could be no question as to those who had served during the September, 1903, term, as the statute provides for an entire new list each year. Whatever may be the object of section 1780 or the effect of a failure to comply with its provisions, it is impossible for us to say whether those provisions were complied with or not for the reason that sufficient of the record to enable us to pass upon that question has not been brought here on these exceptions.

Exceptions eight and nine were taken to the overruling of defendants' challenges to two of the trial jurors for cause. One of these jurors testified on his voir dire that he had sat in a case against a different defendant in the United States District Court, in which he had seen, when looking through different vouchers, one of the defendants' bills and had remarked at the time that he thought it was "pretty raw," that his opinion would probably unconsciously influence him, that he did not think he would start out with an unbiased mind, that he thought he had formed a slight impression and that it would take evidence to remove it, but also said that he could and would decide the case according to the law and the evidence and that alone and would be governed by that and give a fair and impartial verdict and lay aside all impressions that he had and decide entirely on the evidence in this case, and that although it would take evidence to remove his impressions he would still want the

prosecution to prove that the charge was true and could not convict the defendants until they had been proven guilty beyond a reasonable doubt, and that, although these outside matters might probably unconsciously affect him, he would aim to be a fair and impartial juror and give a true and impartial verdict according to the law and the evidence.

The other juror testified that he had read the newspapers and heard discussions in regard to this case, although he couldn't say that he had taken part in those discussions, that he had heard opinions expressed both ways but could not recollect having expressed any opinion himself, although he thought he had one which it would take evidence to remove and that it would have some influence even though slight in his conclusion in this case, but that he would disregard all these matters referred to and decide the case solely upon the law and the evidence here in court.

It is not sufficient to disqualify a juror that he has formed an opinion which it would take evidence to remove. The question is rather whether he could give the defendant a fair and impartial trial upon the law and the evidence in the particular case, and in determining this question much must be left to the sound discretion of the trial judge who is in a much better position than the appellate court to ascertain from the manner and answers of the juror whether he could give a fair and impartial verdict. We cannot say that the trial judge erred in overruling the challenges in question. See *Gallot v. U. S.*, 87 Fed. 446, and cases there cited; also *State v. Brady*, 100 Ia. 191, and *Wise v. Tong Ong*, ante 461. We may add that it does not appear that the defendants' peremptory challenges were exhausted.

The tenth exception was taken to the admission in evidence of the voucher chiefly relied on in this case, after the chairman of the committee on accounts of the house of representatives had testified that the voucher had come to him as representing part of the expenses of the house and that he had signed it in his official capacity as chairman of the committee but that he

did not remember just who presented it to him. Its admission was objected to on the ground that it did not tend to prove any of the allegations of the indictment. After its admission it was further objected that the signatures to it other than that of the witness had not been proved, whereupon the court ruled that it was necessary to establish the instrument before its admission, and the prosecution then presented it simply to be marked for identification until the other signatures should be proved. The instrument must be regarded as having been withdrawn and therefore even if its prior admission had been erroneous the error was cured.

The eleventh exception is abandoned.

The twelfth exception was taken to the admission in evidence of the warrant that was issued on the voucher just referred to, the registrar of public accounts having first testified that it was a treasury warrant signed by the clerk of the house of representatives and paid to the defendant Johnson on April 27, 1903, two days after the alleged conspiracy. The objection to the introduction of this warrant was that it was irrelevant, immaterial and incompetent because it did not tend to prove a conspiracy that occurred two days before. If, as shown above, it was proper to allege in the indictment the acts done in pursuance of the conspiracy it was proper to show those acts in evidence.

The thirteenth exception was taken to the admission of proof by the oral testimony of a member of the house of representatives of what was said in the house of representatives by the defendant Kumalae upon the presentation to the house of the report of the committee on the "Chinese Fund." The objection presented in the court below was that the journal of the house was the only evidence of what occurred there. This objection was properly overruled. Other objections presented now in this court cannot be considered.

The fourteenth exception was taken to the allowance of a question put to the representative just referred to as to whether he ever knew that the defendant Johnson claimed that he drew

the report of the committee on the "Chinese Fund." The objection offered to this was that it was irrelevant as not tending to prove conspiracy. The exception is overruled.

The fifteenth, sixteenth and seventeenth exceptions were taken to the refusal to allow, on cross-examination of the same witness, questions as to whether he knew what practice prevailed among the committees of the house with reference to the appointment of clerks, as to whose function or prerogative it was to appoint the clerk of a committee, and whether he knew if there were other committees that had clerks besides the committee in question, and as to what the practice was of members of committees engaging clerical services without consulting the other members. Various objections were offered to these questions. These exceptions also are overruled.

The eighteenth exception is similar in character to the thirteenth, and is disposed of in the same way. The witness in this instance was the house stenographer.

The nineteenth and twentieth exceptions relate to questions put apparently for the purpose of showing that most of the work of the committee on the "Chinese Fund" was performed by a subcommittee consisting of two members other than the defendant Kumalae and without the defendant Johnson assisting as clerk. The first of these exceptions was to the allowance of a question as to who, if any one, acted as clerk of the subcommittee, this question being put to one who appeared before the subcommittee as a witness. The question was allowed on the undertaking of the prosecution to prove later that the subcommittee was specially delegated to do this work. The other of these exceptions was taken to the allowance of testimony by a member of the subcommittee as to the authorization of the subcommittee to do this work by the defendant Kumalae, who was chairman of the committee. The objection to these questions was that the subcommittee could not constitute the whole committee, and that the chairman of the committee did not have authority to appoint the subcommittee to do the work. These exceptions are overruled.

The twenty-first exception was taken to the introduction of the report of the subcommittee above referred to, after one of its members had testified that the report had been prepared by him from testimony taken by him and the other member, that one of the signatures of the report was his, and that he had presented the report to the house of representatives at the request of the chairman of the committee, the defendant Kumalae, although he had also testified, when asked if he knew Kumalae's signature when he saw it, that he would not like to swear that he knew it. The objection offered was that there were at least two supposed signatures to the report, including that of the defendant Kumalae, which had not been proven. This exception also is overruled.

The twenty-second exception relates to a remark made by the court as to what testimony had been given by the defendant Johnson at the previous trial of the case. The defendant Kumalae had been asked on cross-examination whether he had heard Johnson's testimony at the former trial that as a rule he didn't take more than five minutes a day for his work. Defendants' counsel then submitted that no such testimony was given at the former trial, in reply to which the attorney general said that it may have been five minutes or ten minutes, may have been an hour, whereupon the court said, "I think he stated something to that effect." Defendants' counsel then noted an exception to any statement by the court or counsel as to what was testified to by Johnson on the previous trial. Upon the question being put again as amended it was further objected that this was not proper cross-examination, which objection was sustained. In our opinion no reversible error occurred.

The twenty-third exception was taken to the portion of the charge to the jury given by the court of its own motion, to the portion given at the request of the prosecution, to the refusal to give defendants' requested instructions 1, 7, 10, 11, 12, 13, 14, 15, 20 and 21 and to the modification of defendants' requested instructions 3 and 19. If this should be regarded as one exception, it is too general to be considered by this court.

In so far as it relates to the portions of the charge given by the court of its own motion and at the request of the prosecution, it certainly is too general to be considered by this court, inasmuch as those portions were made up of a number of distinct instructions and the contention is not that they were erroneous as a whole but that only certain portions of them were erroneous. We will treat the exception to the refusal to give certain specified instructions requested by the defendant and to the modifications of other specified instructions as intended to be a separate exception as to each of such instructions.

The point involved in the first requested instruction was raised by exception 3, taken to the overruling of the demurrer, and is disposed of by the ruling upon that exception.

The third requested instruction, which was to the effect that the fact, if it was a fact, that the defendant Johnson cheated the Territory did not constitute the crime of conspiracy, was modified by the addition of the words, "though you may consider this fact, if it be a fact, in reaching a verdict." The modification was proper, as the fact, if it was a fact, that the Territory was cheated was pertinent upon the question of intent. *State v. Noyes*, 25 Vt. 416.

The seventh requested instruction was to the effect that unless the jury should be convinced beyond a reasonable doubt that the defendant Johnson rendered or caused to be rendered no such services as were mentioned in the voucher they could not find the items of said voucher to be wholly false and baseless. There was no error in refusing this instruction.

The tenth requested instruction was to the effect that the prosecution had resorted to evidence tending to prove the offense of gross cheat in order to prove the offense of conspiracy and insisted that because the Territory was cheated the defendants must be guilty of conspiracy also. That instruction was not conformable to the truth.

The eleventh and twelfth requested instructions were expressions as to the policy of indicting parties for the completed offense rather than for the conspiracy in cases where the object

of the conspiracy was the commission of a criminal offense and was carried out. The requests to give these instructions also were properly refused.

The thirteenth requested instruction was to the effect that the jury should be especially careful to avoid being led away by evidence tending to prove the offense of gross cheat and being thereby unduly influenced into the belief that because a fraud may have been perpetrated the defendant should be convicted of a conspiracy to commit such fraud. It was not error to refuse to give such advice to the jury as to the weight to be given to the evidence of the commission of the offense of gross cheat which was the object of the conspiracy. Other instructions that were given pointed out the distinction between the two offenses and called the jury's attention to the fact that the defendants were charged with conspiracy alone and not with gross cheat.

The fourteenth requested instruction may be disposed of in the same manner as the thirteenth.

The fifteenth requested instruction was to the effect that any representations made by either of the defendants to the chairman of the committee on accounts could not be regarded as representations made to the committee itself. It is contended that, although there was no evidence that either of the defendants had made any representations to the chairman of the committee with reference to the bill in question, the requested instruction should have been given because, as the defense contends, the attorney general had argued that the defendants had influenced the chairman into believing that the bill was correct. The prosecution contends that the evidence showed that the false representations consisted in presenting a false and fraudulent bill for services which were therein fraudulently represented to have been performed, and that the bill, when handed to the chairman, was by him submitted to the entire committee and that the committee audited it. We find no error in refusing the request to give this instruction.

The nineteenth requested instruction was to the effect that neither the court nor the jury could sit in revision upon the

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legitimate acts of the legislature and that if the jury believed that the defendant Johnson was in fact engaged by the defendant Kumalae to perform the services in question and did in fact render some such services the jury could not consider whether the compensation allowed and paid for such services was or was not reasonable. This was modified by the addition of the words, "if you further believe from the evidence beyond a reasonable doubt the charge of conspiracy has not been proven," thus purporting to give the prosecution instead of the defendants the benefit of a reasonable doubt. It is conceded that the modification was made to read this way through inadvertence. It was nevertheless error, but in view of the prior and subsequent clear and correct instructions on the question of reasonable doubt it was not harmful error.

The twentieth requested instruction was to the effect that the legislature was supreme within its own domain and not subject to have its legal acts questioned by any other department, that it was within the domain of the house of representatives, acting through its committee, to engage and pay for the services of the defendant Johnson as mentioned in the voucher, and that unless the jury should believe beyond a reasonable doubt that Johnson entirely failed to perform such services in some one or more of the items contained in the voucher the defendants should be acquitted. This requested instruction was objectionable for the reason that it assumed as proved that Johnson was engaged and paid through the committee for the services mentioned in the voucher and also because it charged that the defendants should be acquitted unless Johnson entirely failed to perform the services mentioned in one or more of the items contained in the voucher. The first part of the instruction, whether appropriate or not, was covered by the preceding instruction which was given.

The twenty-first requested instruction was to the effect that the report of the committee on accounts to the house of representatives, dated April 28, 1903, was not evidence of the auditing and approval of the voucher by the committee because it

was not made until after the payment of the warrant issued upon the voucher. There was no error in refusing the request to give this instruction.

The twenty-fourth and twenty-fifth exceptions, which were taken to the verdict as contrary to the law and the evidence and to the overruling of the defendants' motion for a new trial, raise only questions that have already been disposed of under other exceptions.

The exceptions are overruled.

L. Andrews, Attorney General, and *W. S. Fleming*, Assistant Attorney General, for the prosecution.

C. W. Ashford and *A. S. Humphreys* for defendants.

IN THE MATTER OF J. ALFRED MAGOON, AN
ATTORNEY AT LAW.

ORIGINAL.

TRIED MAY 15-22, 1905.

DECIDED JUNE 2, 1905.

FREAR, C.J., AND CIRCUIT JUDGES LINDSAY AND PARSONS IN
PLACE OF HARTWELL AND WILDER, JJ.

ATTORNEY—*accepting retainer from adverse party. misconduct.*

An attorney for a judgment creditor is held guilty of unprofessional impropriety and misconduct for accepting from one of three joint judgment debtors, who had paid what he considered his share of the judgment, a retainer to bring creditors' bills against the other two debtors for the purpose of relieving the first mentioned debtor from further liability, even though such retainer was accepted with the consent of the judgment creditor and for the purpose of bringing such suits in the name and for the benefit of such creditor and to relieve the said debtor from further liability

only in so far as satisfaction should be obtained from the other debtors, there being, however, an understanding implied from the acceptance of the retainer for such purposes that further proceedings to collect the remainder of the judgment from the said debtor should be delayed until after such suits should be brought against the other debtors; but under all the circumstances it is deemed sufficient to severely censure the attorney and impose on him the costs of this proceeding.

This is an information for the disbarment, suspension or other punishmentw of J. Alfred Magoon, an attorney at law, for professional improprieties, malpractice and gross misconduct in substance as follows: (1) That on or about July 14, 1902, while acting as one of the attorneys for the plaintiffs in the case of H. R. Hitchcock, L. H. Dee, H. L. Evans and Charles J. Fishel on behalf of themselvec and all other stockholders in the Kamalo Sugar Company, Ltd., v. Frank Hustace, John J. Egan, Frank H. Foster and the Kamalo Sugar Company, Ltd., in which the plaintiffs had obtained a decree against the defendants Hustace, Egan and Foster jointly for \$35,000, with interest and costs, and 6000 shares of stock of said company, upon which decree execution had been issued and partial satisfaction obtained by the payment by said Hustace of \$11,951.57 and 5288 shares of said stock, the respondent accepted from said Hustace a retainer of \$150 in the matter of advising him as to how he could escape from full liability under said decree and in the matter of enforcing the remainder of said decree solely against the property of said Egan and Foster; (2) that on or about said date the respondent, while acting as attorney for said plaintiffs and said Hustace as aforesaid, and while said decree was unpaid, except in part as aforesid, and knowing that Hustace had property from which the decree could be satisfied in large part and that it was for the interests of the said plaintiffs to proceed against Hustace's property, advised Hustace to make a deed of all of his property to some third party, without adequate consideration, thereby disposing of his assets, hindering, delaying and defrauding his

creditors the said plaintiffs as well as any other creditors; (3) that said advice was given under claim by respondent that he would thereby be able to have said execution returned unsatisfied and would thereupon proceed by creditor's bill against Hustace's codefendants, said Egan and Foster, to set aside conveyances alleged to have been made by them in fraud of their creditors, alleging in such creditor's bill the return of execution unsatisfied; that thereafter on or about September 3, 1902, Hustace made deeds of all his property to various third persons including a deed of one parcel to one W. H. Smith, and a deed of sundry parcels to one Charles Hustace, Jr., but that the respondent did not proceed against said property of Egan and Foster, but, while retaining the retainer paid by Hustace, proceeded as attorney for said plaintiffs to cause execution to be levied on the property so conveyed by Hustace, causing the same to be sold at sheriff's sale on or about January 8, 1903, and thereafter as attorney for L. H. Dee, one of the purchasers at such sale, brought a suit against said Smith to set aside the conveyance made to him by Hustace as fraudulent and in such suit attacked all of said conveyances by Hustace as fraudulent.

Much testimony was taken and many exhibits, including the records in the two cases above mentioned, were filed.

Per curiam: The crucial questions are whether the relation of attorney and client was created between the respondent and Hustace by the payment to the former by the latter of the retainer of \$150, and whether, if so, the matter in respect of which that retainer was paid was one in which the interests of the respondent's two clients, the Kamalo Sugar Company and Hustace, were adverse. If either of these questions is decided in the negative, nothing remains in the case so far as the evidence shows that would call for the punishment of the respondent in this quasi-criminal proceeding.

While the respondent may have acted originally for the nominal plaintiffs in the Kamalo case the suit was in reality for the benefit of the company and at the times in question he

was apparently acting for the company itself, the directors of which had come, by reason of changes in their personnel, into harmony with the nominal plaintiffs. There was no reason why the respondent could not in such case act at the same time for the nominal plaintiffs and for the company, which, though nominally a defendant, was for all practical purposes the real plaintiff, and in favor of which rather than in favor of the nominal plaintiffs the decree was actually rendered.

With the consent of his client the company, the respondent might have pursued Egan and Foster by execution or creditor's bill or otherwise before proceeding further by execution against Hustace, who had already paid what he supposed was his share under the decree. He was already, with such consent, as he supposed, proceeding against the property of Egan and Foster by execution before proceeding further against that of Hustace, and he supposed that he had such consent to so proceed by creditor's bill or other suit also. The fact, if it was a fact, that Dec, who represented the nominal plaintiffs and the company in their dealings with the respondent and who communicated such supposed consent to him, did not have formal or strictly legal authority to such an extent from the directors or the stockholders is immaterial so far as the question of the quasi-criminal liability of the respondent is concerned, even if it would render him liable to criticism for carelessness or lack of good judgment or perhaps render him civilly liable. The question of ultra vires does not affect this case, although there might be circumstances under which it might affect a case of this general nature. There is no doubt that the directors and most if not all of the stockholders were agreeable to proceeding against Egan and Foster by execution at least, before proceeding further against Hustace.

The respondent might also without being quasi-criminally liable, so far as his duty to his client the company was concerned, have discussed with Hustace as an adverse party and with the consent which, he supposed he had, of the company, the proposition of Hustace's putting his property out of his

name so as to enable the company to proceed by creditor's bill against Egan and Foster on condition that Hustace should first give adequate security for the payment of the decree in case of failure to obtain satisfaction from Egan and Foster. The respondent did not advise Hustace to transfer his property for the purpose of enabling him to escape liability under the decree to the prejudice of the company. He suggested and perhaps advised that a transfer of the property might or should be made so as to remove a supposed legal obstacle to the bringing of the creditor's bill against Egan and Foster, which obstacle was discovered in looking up the law preparatory to bringing the Creditor's bill. The object was to proceed against Egan and Foster and to relieve Hustace only in so far as payment should be obtained from the others, and the transfer by Hustace was to be made, if at all, only in case he gave satisfactory security for the protection of the company. Apparently Hustace, in transferring his property, acted largely on the advice of others.

Proceeding against Hustace afterwards by execution upon the transfer of his property without giving such security was justifiable if the relationship of attorney and client did not exist between the respondent and Hustace.

Whether the course discussed or proposed or advised would, if consummated, have resulted in a fraud upon the court does not appear. The negotiations or propositions had not gone far enough to show what the result might have been in that respect. Apparently the respondent was doing what he believed was right and with no intention of perpetrating a fraud upon the court and with the idea of effecting justice to Hustace without either prejudice to his client, the Kamalo Sugar Company, or fraud upon the court. We may differ from the respondent as to the advisability or wisdom of his conduct in these respects and other respects to which no reference need be made, but cannot hold him quasi-criminally liable therein.

To return to the crucial questions set forth above, was the relation of attorney and client created between the respondent and Hustace by the payment of the retainer? There is much

to indicate that such was not the case but that the respondent was to act thereafter, as he had previously acted, solely as attorney for the Kamalo Sugar Company, and not as attorney for Hustace, and that Hustace paid the retainer simply on behalf of the Kamalo Sugar Company, which was supposed to be willing to proceed by creditor's bill or other suit as well as by execution against Egan and Foster before proceeding further against Hustace, provided the latter would pay the expenses of such litigation. There is testimony in support of this, not only by the respondent and Dee, who, as already stated, was the representative of the company in its dealings with the respondent, but also by Hustace, the principal witness for the prosecution, although the testimony of the latter as a whole and some of Dee's tends in the opposite direction, and some of the respondent's upon this point is not as clear as it might be. The respondent also consulted several times with Mr. Robertson who was Hustace's attorney in the Kamalo suit, although he also had several consultations with Hustace in his own office when Mr. Robertson was not present. The respondent also testified that in his discussions with Hustace he cautioned him not to disclose what property he had as he, respondent, might have to proceed against it later on. There is also other evidence tending in the same direction.

On the other hand there is evidence of a more or less forcible character, some of it, unfortunately for the respondent, consisting of statements approved or made, both orally and in writing, by himself, which tends to show that even he considered that he was retained to a certain extent at least to act for Hustace as well as for the Kamalo Sugar Co. For instance, in his written communication of February 24, 1905, to the "Advertiser" he says, "In this distress he (Hustace) came to me. I, representing the Kamalo Sugar Company, was the only person in all the world who could help him. My antagonist came to me asking for mercy and justice. Fool, that I did not turn a deaf ear; but I was only too willing to come to his aid provided I could do so without prejudicing my client, the Kamalo Sugar

Co., the directors of which have approved of all that I have done. All I asked of Hustace was \$150 retainer, out of which I would be obliged to advance costs; this he freely paid. A moderate retainer alone would have been \$500, and the work I did amounted to more than the \$150, which I received." And in his answer the respondent relies upon and sets forth what he considers a ratification of his acts signed by the directors of the company, in which the latter say, among other things, "We therefore heartily approved of the suggestions made by Mr. Dee, that proceedings should be attempted against Egan and Foster, and it was perfectly agreeable to us that Mr. J. Alfred Magoon should act as attorney for Mr. Hustace with the above end in view, provided Mr. Hustace should see fit to employ him." This document was apparently prepared in Mr. Magoon's office and was taken around to the directors for their signatures by Mr. Lightfoot of Mr. Magoon's office. The retainer was recently returned by the respondent to Mr. Hustace.

The fact that the suits were to be brought in the name of the company does not show that the respondent was not retained by Hustace any more than the fact that the retainer was paid by Hustace would necessarily show that he was retained by Hustace.

If the relation of attorney and client was created between the respondent and Hustace, was it a matter in which the interests of the Kamalo Sugar Company and Hustace were adverse? The retainer was paid for the institution of suits by the Kamalo Sugar Company against Egan and Foster for the purpose of relieving Hustace from further payments in so far as payments could be compelled from Egan and Foster. If the bringing of such suits for the purpose of enforcing payments from Egan and Foster, or even for the purpose also of relieving Hustace thereby, had been the sole object of the retainer, there would have been no impropriety in accepting it, for to that extent the interests of the Kamalo Sugar Company and Hustace were not adverse. But that was not the sole object. It could not very well have been the sole object in fact, and was not the sole object contemplated as shown by the testimony of all the witnesses. The

proposition contained by implication the postponement of further proceedings against Hustace for a time at least. If the respondent was the attorney of the company alone he could properly have proceeded at any time against Hustace upon instructions to do so from the company, notwithstanding the institution or prosecution of the suits against Egan and Foster. But if he was attorney for Hustace as well under a retainer given by Hustace for the very purpose of relieving him so far as possible from further payments and for proceeding against Egan and Foster solely for that purpose, he could not properly proceed upon instructions from his client the company against his client Hustace until proceedings had first been taken against Egan and Foster. That the interests of the two clients were adverse to a certain extent was very soon shown by the subsequent developments above set forth. The fact, if it was a fact, that the respondent acted in this dual capacity by the consent of both clients would not make it right for him to do so although it would be a mitigating circumstance to be considered in determining the amount of the penalty.

In our opinion the relation of attorney and client was created between the respondent and Hustace in a matter in which a similar relation existed between the respondent and the Kamalo Sugar Company and in which the interests of the two clients, the company and Hustace, were adverse. But such relationship between the respondent and Hustace was of a very loose character. The respondent was regarded by all as primarily at least the attorney for the company. So far as bringing the suits against Egan and Foster was concerned, which was the direct object of the retainer, the interests of the respondent's two clients, the company and Hustace, were not adverse. So far also as relieving Hustace by compelling payment from Egan and Foster was concerned, which was the indirect object of the retainer, the interests of the two clients were not adverse. The particular in which such interests were adverse was the delay in proceeding further against Hustace—a matter of implication, in respect of which it was not clear at that time that there would

be any occasion to act in a manner adverse to the interests of one of the clients. The moving cause of Hustace's paying the retainer was the avoidance of the expense to the company. The mistake consisted in accepting it as a retainer from Hustace instead of having it paid so that it would clearly be a retainer from the company alone. These matters occurred nearly three years ago. The respondent supposed that he was doing only what was proper and with the consent of his client, the company. But he should have known better.

The respondent is found guilty of professional impropriety and misconduct, but in view of all the circumstances it is deemed sufficient to severely censure him and require him to pay the costs of this proceeding, and it is so ordered.

S. M. Ballou, deputy attorney general, for the prosecution.

Respondent in person; J. Lightfoot and W. A. Whiting with him.

WILLIAM R. CASTLE, A TAXPAYER OF THE TERRITORY, ON HIS OWN BEHALF AND ON BEHALF OF ALL AND SINGULAR THE TAXPAYERS OF SAID TERRITORY, AND AN OWNER OF BONDS OF SAID TERRITORY, v. A. L. C. ATKINSON, SECRETARY OF THE TERRITORY.

SUBMISSION ON AGREED FACTS.

ARGUED MAY 27, 29, 31, 1905.

DECIDED JUNE 2, 1905.

FREAR, C.J., HARTWELL AND WILDER, JJ.

EQUITY JURISDICTION—*at suit of taxpayer to enjoin expenditure of public moneys under unconstitutional statute.*

Equity has jurisdiction at the suit of a taxpayer to enjoin an executive officer from expending public moneys in pursuance of

an unconstitutional statute, although not to determine political rights not affecting rights of property.

COUNTY ACT—*validity as affected by grounds presented.*

Neither act 39, as amended by act 54 of the Laws of 1905, known as the County Act, nor act 93 of said Laws relating to the payment of county expenses, is invalid or unconstitutional in the sense that it is unauthorized or prohibited by the Organic Act of the Territory upon any of the grounds presented in this case.

OPINION OF THE COURT BY HARTWELL, J.

The case is presented in order to obtain a determination of the plaintiff's right, which he claims, that he is entitled upon the agreed facts to an injunction restraining and enjoining the secretary of the Territory from taking any further proceedings or steps in the matter of the first election for county officers required by the County Act to be held June 20, 1905, and from expending any of the Territorial revenues or money in connection therewith.

The plaintiff claims that for certain specified reasons the Act is unconstitutional and void, and that as a citizen of the United States and of the Territory of Hawaii, a resident of Honolulu, a taxpayer and a holder of Territorial bonds "he has a legal right by a proper bill in equity to apply to a circuit judge of the first judicial circuit of said Territory for an injunction restraining the said secretary from the expenditure of money in the Territorial treasury for and in connection with the special election directed by said County Act." The grounds on which the plaintiff claims that the Act is unconstitutional may thus be summarized, namely:

1. That it is not an Act creating counties and providing for the government thereof, as it makes no provision for payment of expenses of county governments, and in violation and disregard of the principle of local self-government ignores local taxation within each county and contains no provision for assessment of property and collection of local taxes for support of the county government, thereby making counties a Territorial

charge, undertaking to support and maintain the local government of each county out of Territorial revenue, and applying the credit of the Territory to the support and maintenance of the local government of each county; rendering the counties merely beneficiaries of the Territory, and compelling the taxpayers of the entire Territory to support the local government within each county.

2. That the Act violates section 45 of the Organic Act requiring "that each law shall embrace but one subject which shall be expressed in its title," since it purports to create counties and is therefore new legislation not amendatory of or supplementary to pre-existing legislation, and assumes to transfer many of the duties of the superintendent of public works, of the attorney general, of the high sheriff and of other Territorial officers to the counties and their local officers; and covers distinct changes in pre-existing laws affecting whole systems of the Territorial government and chapters of the Revised Laws.

3. That except as to certain salaries the Act contains no definition of or limitation upon the expenditures of counties and provides no fixed revenue for their support and maintenance or for payment of local expenditures. The only limitation of expenditures is that they fall within the 50 per cent. of the total amount of poll and school taxes and taxes on property and income collected in each county, which by Act 93 is to be paid to county treasurers. Such a plan for payment of local expenditures is impracticable and incapable of enforcement. There is no limitation upon the amounts for which county warrants are to be drawn by the auditor upon the treasurer of the Territory in favor of county treasurers. Act 93 "relating to funds for the payment of expenses for the several counties" transfers to the auditor powers that could be legally exercised by the legislature only, or if requisite powers were delegated to them, by the boards of county supervisors. The auditor is invested by Act 93 with discretion to determine the amounts above 10 per cent. of the estimated taxes payable to each county within six months from July to December next and afterwards not less than 15 per

cent., for which monthly warrants shall be drawn, there being no proportion fixed between the warrants and the actual or current expenditures of the counties. Act 93 compels the Territorial treasurer, if there is no money in the treasury to pay the monthly warrants, to register them and thereafter until paid they bear interest at 5 per cent. per annum, thereby creating an enforced loan by the Territory to the counties for which the Territory is charged interest, the Territorial credit as well as its cash revenue being thereby applied to the support and maintenance of counties.

4. That in transferring to the counties the right to "open, construct, maintain and close up public streets, highways, roads, alleys, trails and bridges," the Act transfers powers now exercised by the superintendent of public works, aided in some instances by the governor and high sheriff, thus materially and radically changing the road system of the Territory.

5. That Act 93 provides that the road taxes shall be a special deposit in the Territorial treasury to the credit of each road district, to be paid by the treasurer of the Territory to the county treasurers and "expended only for the maintaining and repairing of public roads and highways in the several road districts as authorized by the supervisors of the county from time to time." This is a transfer from the management of the superintendent of public works, inaugurating a system which conflicts with the Territorial system, and is legally impracticable and incapable of enforcement. The Act also impairs the obligation of the bonds of the Territory in depriving them of the security of the consolidated territorial revenues to the extent of 50 per cent. of the taxes required by Act 93 to be paid over to the counties.

6. That the Act in requiring bonds of supervisors to be approved by circuit judges imposes upon them functions not judicial, and not according to the course of common law or equity or to any provision of the Organic Act.

7. That the Act violates those provisions of the Organic Act which require that "there shall be an attorney general," a superintendent of public works, a high sheriff and deputies, and which

require that they severally "shall have the powers and duties" mentioned or referred to in the Organic Act "except as changed by this Act and subject to modification by the Legislature." It is claimed that the powers and duties entrusted to and required of those officials by the terms of the Organic Act are not merely modified by the County Act but practically are obliterated and transferred to county officials.

8. That the Act deals with contested elections, and also with impeachment of supervisors, subjects not cognate to its title, and is an attempt to confer jurisdiction on the Supreme Court in those matters.

9. That the county of Kalawao established by the County Act is identical with the leper settlement, which the Act leaves under the control of the Board of Health, and which is incapable of organization into a county while under the control and management of the Board. That the chapter relating to this matter is unconstitutional in providing that the salary of the sheriff shall be fixed and paid by the Board of Health out of the Territorial appropriation, and that the pay of policemen in that county shall be fixed and paid by the Board out of Territorial funds, and also in fixing the appointment of a sheriff in the Board, which has no power to make such appointment.

10. That section 112 of the County Act providing that "All laws or parts of laws, so far only as the same may be inconsistent with any provision of this Act are hereby repealed," is insufficient and void in failing to specify the repealed Acts and parts of Acts, so that it is legally impossible to determine what laws are intended to be repealed.

When the case was presented for argument the plaintiff's attorney asked leave to amend the submission by inserting the additional ground that the Act had not been approved by the Governor in accordance with the requirements of section 56 of the Organic Act as amended by Act of Congress of March 3, 1905, (33 Sts. at L. 1035) requiring that county officials "be appointed or elected, as the case may be, in such manner as shall be provided by the Governor and legislature of the Territory.'

The defendant's counsel objecting the court declined to allow this amendment.

The defendant denying that the Act is invalid for any of the reasons named in the submission claims that even if the Act were invalid equity has no jurisdiction to grant an injunction against him at the suit of a taxpayer or of a bondholder whose bonds are not shown to be in danger of being defaulted.

That the remedy sought by the plaintiff is available to him in his capacity as a citizen and taxpayer appears to be within the rule in *Castle et al., v. Kapena*, 5 Haw. 27 (1883). The petitioners in that case applied for a writ of mandamus to require the minister of finance to accept only United States gold coin or its equivalent for Hawaiian bonds payable in United States gold coin about to be issued by him in pursuance of an Act of the legislature, and not to accept therefor silver coin, averred to be only about 82 per cent. of the value of the gold coin. The court held that issuing the bonds for silver of less par value than gold would be illegal and that "a loss and injury would accrue to the country thereby and to every taxpayer, and the question is raised whether the petitioners can resort to this court to protect themselves." *Ib.* pp. 34, 35. "The principal objection," said the court, "to permitting suits to be brought by private taxpayers, is said to be the annoyance to public officers by a multiplicity of suits. The answer to this, as well as the doctrine in such cases, is set forth in a recent case in the Supreme Court of the United States, *Crampton v. Zabriskie*, 101 U. S. Reports, heard in 1879. We quote the language of Mr. Justice Field at large:

'Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases, and from the nature of the powers exercised by municipal corporations, the great dangers of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere,

upon the application of the taxpayers of a county, to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. The courts may be safely trusted to prevent the abuse of their process in such cases.' " The court also cites in the *Kapena* case *U. P. Railroad Company v. Hall*, 91 U. S. 343 in 1875, where Strong, J., says: "There is a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the Government as such, without the intervention of the Government law officer." The court declined, however, to grant the writ, but solely upon the ground that injunction rather than mandamus was a "preventive remedy."

In *Larcom v. Olin*, 160 Mass. 102, (1893), a similar question was presented in a petition by inhabitants, taxpayers and voters of the town of Beverly for a writ of mandamus to command the secretary of the commonwealth not to attest or deliver to the clerk of the town or any other person a copy of the provisions of articles of city government consented to by vote of a majority of the inhabitants present and voting at a meeting called for the purpose of deciding whether the town would become a city. A second petition was also presented by inhabitants praying that the votes at the meeting be declared null and void and that the secretary be perpetually enjoined from attesting or delivering to the clerk of the town or any other person a copy of the proposed articles of city government. The court, while denying the injunction on the ground that "It is not within the general powers of a court of equity to supervise the conduct of public officers in the performance of their official duties, or to prohibit such officers from acting or to compel them to act in matters which concern political and personal rights, as distinguished from rights of property, granted the petition for mandamus saying: "It is suggested in the brief of the petitioners that courts in some jurisdictions have held that mandamus cannot be used as a preventive remedy; but this objection is not taken by the respondents, and, if it affects anything more than the form of the order to be issued by the court, it may perhaps be

met by considering the petition as in substance a petition for a writ of prohibition."

State decisions cited for and against the exercise of jurisdiction such as is claimed by the plaintiff are interesting and of value to the student of law, but, as above stated, the question has been decided by this court in favor of the exercise.

The U. S. Circuit Court of Appeals for the ninth circuit has held that an early decision of this court, modifying a rule of the common law, to the extent of giving to legal representatives of a decedent a right of action for the fatal injury had the approval of the Organic Act in its provision for continuance in force of laws of Hawaii. *Schooner Robert Lewers*, 114 Fed. 849. The *Kapena* case was expressly affirmed in *Lucas v. American-Hawaiian Engineering & Construction Co.*, ante, p. 86, in which the court used the following language:

"The right of a taxpayer to bring suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction since the case of *Castle et al. v. Kapena*, 5 Haw. 27 (1883)." We see no occasion to depart from this rule. The argument that a single taxpayer may not represent the wishes of the majority and that a question of public interest ought not to be adjudicated at his sole instance, with no opportunity for expression of opposing views, does not, in our opinion, affect his right to an adjudication. Any person, citizen or not, accused of an offense, may raise the question of the constitutionality of the law under which he is tried, and no one but himself and the prosecution is entitled to be heard upon it. Adjudicating the constitutionality of the act in advance of county organization avoids unnecessary expense and complication if the decision is adverse to the Act, and, if in its favor, furnishes desirable assurance of legal protection to those who shall be elected to county offices besides having burdensome and expensive litigation in respect of matters so adjudicated.

While equity has not jurisdiction to determine political rights but is confined to questions affecting rights of property, it appears to us that the case presented by the plaintiff in his

capacity as a taxpayer comes within equitable jurisdiction for protection of property rights against acts of executive officers under unconstitutional statutes.

It is contended by the defendant that an injunction to restrain illegal expenditure of money, if issued at all, must be directed not against the secretary but the treasurer or auditor. This contention appears to us to be well grounded and might necessitate amendment of the submission if cause were shown for holding the County Act to be invalid.

The validity of the Act affects this community profoundly. As a measure intended to establish self government over local affairs, a principle which is the basis of our state and national systems, it has been urged by all parties. The Organic Act grants unrestricted suffrage, by the exercise of which the needs and wishes of the citizen are intended to be expressed and carried into effect by laws enacted by the legislature. The grant of legislative power contained in the Organic Act includes "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable," and expressly includes the power to "create counties and town and city municipalities and provide for the government thereof." There is no limitation upon this power except as found in the provisions of the Organic Act and in the Constitution. The desire of the voters to obtain and by officers elected by themselves to exercise all the control over their local affairs which can be obtained within this limitation ought not to be interfered with by the judiciary upon doubtful or uncertain grounds. It is essential for the welfare of Hawaii, for the security of life and property that the measure devised for establishing this principle, imperfect in many details and to a certain extent tentative as it well may be and yet be a valid measure, shall be free from such radical defects as would defeat its object. With political or financial objections to the Act, if any there be, this court has nothing to do. We have only to decide whether any of its vital features are so inconsistent with the Organic Act as to require the inference that it is not authorized thereby. It is to be observed that

the organization of counties with their proper officers for attending to their own affairs necessarily is inconsistent with all those laws of Hawaii relating to such portions of the duties of Territorial officers as properly are included in the duties and functions of county officers. No County Act can be regarded as unauthorized by the Organic Act by reason of such inconsistency.

The disposition of public funds is no moot or abstract question but vitally concerns every taxpayer. We trust that the time will never come in Hawaii when taxpayers shall not care to seek by appropriate proceedings in court to avert unlawful use of public money in connection with an unconstitutional statute. But there is something far more important than such exhibitions of public spirit on the part of taxpayers, and that is a feeling of confidence that courts will interpret the laws and declare the law with judicial impartiality unbiased by personal feeling or motive. Nothing can be more deplorable, more abhorrent to true Americanism, than a belief, thus far it is to be hoped felt by few persons, that our courts in interpreting statutes can reach conclusions to satisfy their own wishes, likes or dislikes. It ought to be unnecessary to say that what we may think of the wisdom or advantages of county government under existing conditions in Hawaii has nothing to do with the questions of law at issue. Our opinion concerning the practical working of this or of any other system of county legislation, whether it appears to us that larger opportunity for effectuating popular wishes in the expenditure of public money or in other matters is thus afforded or not, is immaterial and irrelevant to the examination of those questions. With these convictions of judicial duty we have examined and decided the law involved in this case.

The agreed statement sets forth the plaintiff's grounds or reasons for claiming the invalidity of the Act in more detail and variety of form than appear in the above summarized statement of them and his attorney in argument illustrated and enforced the plaintiff's claims from several points of view.

We have already observed that the Act would not be uncon-

stitutional because in provisions for government of counties and control of county affairs by elected county officers, it conflicts, as to a considerable extent it must do, with provisions in the Organic Act for Territorial government by appointive Territorial officers, nor even if in some matters it unnecessarily substitutes county officers for Territorial officers. Considerable discretion must be allowed for the exercise of the expressed power to create counties and provide for their government. A narrow, rigid construction of the meaning of that power is not required for the accomplishment of any express or implied purpose of the Organic Act, and therefore is inappropriate.

Creating counties and providing for their government does not require and therefore does not imply the abrogation of the functions in respect of Territorial affairs of the Territorial officers such as the attorney general and superintendent of public works. As far as officers other than the attorney general are concerned, we do not consider that the Act unduly encroaches upon their prescribed functions. The Organic Act places with the attorney general the duty of prosecuting violations of Territorial penal laws and claims, together with many other duties imposed upon him by the laws of Hawaii, subject to such "modification" as the legislature may by law enact. The provision that these duties "are subject to modification by the legislature" was not necessarily made solely with reference to the authority "to create counties," etc., but may appropriately relate as well to details making those duties more specific, or enlarging them but not substantially revoking them nor substituting for their performance another officer in place of the attorney general.

The Territory as well as counties is concerned in the enforcement of Territorial penal laws. It is the Territory and not the counties to which accrue fines and costs for violation of Territorial laws and the proceeds of Territorial claims. To place with county attorneys to the exclusion of the attorney general the duty of prosecuting them would not be a "modification" of the attorney general's duties but practically a repeal of that portion of the

Organic Act which relates to them. Violation of county ordinances and prosecution of county claims would properly be entrusted to county attorneys only, but that is the extent to which their exclusive authority can go without subverting the Territorial system provided by Congress. Even if it were true that the Act in respect of the attorney general's functions or in some other respects goes further than is contemplated by the provisions of the Organic Act for county government, there is nothing therein which appears to us to invalidate the Act. The result would simply be that the attorney general would still be authorized to perform all of his functions as prescribed by the Organic Act as far as they concern Territorial matters. This is perhaps the intent of the provision in the County Act which makes the county attorneys the deputies of the attorney general.

Further considering the objections presented to the County Act it is to be observed that a county is the agent or instrumentality of the state or territory and has such powers only as are granted by the statute creating it. Whether counties have the scant powers given them in the New England states or the larger powers given in newer states is something which does not affect the validity of the Act.

Counties may properly share in Territorial tax money assessed and collected by assessors and collectors of the Territory.

We find nothing in the Act which is not expressed in its title in the sense of being properly incident germane or cognate thereto.

The large discretion given by each of the acts in question to county supervisors, as well as to the auditor of the Territory, concerning expenditures of public money and the extent and objects of such expenditures, may or may not be wiser or desirable and may or may not give better opportunity for expression of popular wishes in those matters than is afforded by the present Territorial system. Such considerations, however, do not invalidate either of the acts.

The control of roads and bridges transferred to counties is a modification of the powers and duties of the superintendent of public works and essential to the control by counties of their own affairs.

There is nothing in the Organic Act which precludes placing upon circuit judges the function of approving bonds of supervisors or empowering this court to deal with contested elections.

The provisions of the County Act making the leper settlement a separate county under the control of the Board of Health conflicts with no provision of the Organic Act.

The section repealing inconsistent laws is sufficient for its purpose, leaving cases of doubt for judicial construction. Even without this section such repeal "is implied when the new law contains provisions contrary to or irreconcilable with those of the former law." Sec. 21, R. L.

All of the matters presented have been ably argued and have received our careful attention, but we do not find that either the County Act, being Act 39, as amended by Act 54, or that Act 93 of the session laws of 1905, upon any of the grounds presented, is unauthorized or prohibited by the Organic Act, or that for any of those grounds or reasons Act 39, as amended or Act 93 is invalid.

In conformity with this opinion the injunction sought by the plaintiff ought to be denied, and it is decreed accordingly.

H. E. Highton for plaintiff.

Deputy Attorney General M. F. Prosser and *H. E. Cooper* for defendant.

Decisions Announced without Opinions During the Period Covered by this Volume.

NO. 6. MARIA CORREA V. L. M. BALDWIN AND W. E. SAFREY. Appeal from district court, Wailuku, island of Maui. Submitted December 6, 1904. Decided December 27, 1904. Action for damages for taking a bull and several cows and calves and selling them on execution. Appeal by plaintiff. The points raised by the appeal are that the magistrate erred (1) in refusing to allow an amendment by adding one heifer and two calves, (2) in granting a continuance on an insufficient showing, and (3) in granting a continuance for an uncertain and indefinite period, namely, "until defendant L. M. Baldwin shall get well." Defendant contends that questions of amendment and continuance are in the discretion of the trial court; also that the rulings made are not final for the purposes of appeal. Per curiam: An indefinite continuance by a magistrate is equivalent to an order of dismissal and is appealable. *Humbury v. Namura*, 13 Haw. 702. The denial of the amendment was interlocutory and not appealable by itself but the question of the correctness of the ruling may be raised on the appeal from the final judgment of indefinite continuance. Rulings upon amendments, although largely in the discretion of the trial court, may be reversed on appeal in case of abuse of discretion. *Lum Sung v. Luning*, 13 Haw. 665. The amendment should have been allowed in this case, and the indefinite continuance should not have been allowed. Judgment reversed and case remanded for further proceedings. *J. M. Vivas* for plaintiff. *E. M. Watson* and *J. L. Coke* for defendants.

NO. 10. KONA-KAU TELEPHONE AND TELEGRAPH COMPANY V. H. H. MILLS. Appeal from judgment for plaintiff of district magistrate of South Kona, island of Hawaii. Submitted December 5, 1904. Decided December 27, 1904. The plaintiff brought an action to recover possession of a telephone instrument and battery alleged to be unlawfully detained by the defendant, averring that the plaintiff had "demanded of the defendant the return to plaintiff of the said property; that the defendant refused and still refuses to deliver to the plaintiff the said property and still unlawfully detains the same," and praying judgment for the return of the instrument or \$30 in lieu thereof and for \$100 damages for the detention thereof. The magistrate gave judgment for the plaintiff with \$5 damages. The defense is that the demand for the instrument shown by the evidence as made two years before the action was a "stale demand." *Per curiam*: The appeal is dismissed. *G. F. Maydwell* for plaintiff. Defendant in person.

NO. 34. M. F. SCOTT, PLAINTIFF, V. H. T. MILLS, DEFENDANT, AND J. H. FISHER, AUDITOR OF THE TERRITORY, GARNISHEE. Appeal from district court, South Kona, island of Hawaii, on point of law. Submitted December 5, 1904. Decided December 27, 1904. Assumpsit for the price of lumber sold and delivered. The only question raised, whatever others might have been raised, is whether the magistrate erred in allowing attorney's commissions after rendering judgment for the defendant upon what the latter called a plea in abatement, but which was a demurrer to the complaint based on the ground that the lumber was not sufficiently described. Leave to amend was requested by plaintiff but denied. No question is raised as to the correctness of the ruling on the demurrer. The plaintiff appellant relies on *Ahoy v. Scott*, 12 Haw. 348. *Per curiam*: *Ahoy v. Scott* is not in point. Judgment affirmed. Plaintiff in person. Defendant in person.

No. 35. M. F. SCOTT v. JOE HENRIQUES. Appeal from order of Edings, J., of the third circuit dismissing defendant's appeal from judgment of the district magistrate of South Kona to the circuit judge of the third circuit at chambers. Submitted December 5, 1904. Decided December 27, 1904. Per curiam: The appeal to this court is dismissed, the statute giving a circuit judge at chambers jurisdiction of appeals from judgments of district magistrates having been repealed by section 20, Act 32, Laws of 1903. Plaintiff in person. Defendant in person.

No. 41. IN RE ESTATE OF MARGARET V. CARTER, DECEASED. Appeal from Circuit Judge Robinson, First Circuit Court. Argued November 11, 1904. Decided November 21, 1904. Petition for removal of executrix. Demurrer to petition stricken from files and executrix removed on allegations of petition without further hearing, there being no answer. Per curiam: Demurrer lies to petition for removal of executrix. Decree appealed from reversed. Case remanded to circuit judge for further proceedings consistent herewith. *L. Andrews* for petitioner. *C. W. Ashford* for executrix appellant.

No. 47. SAMUEL ANDREWS v. KAIKENA. Exceptions from circuit court, first circuit. Submitted November 14, 1904. Decided November 21, 1904. Action of ejectment. Nonsuit ordered on the ground that the plaintiff's evidence showed that he had parted with his title since the commencement of the action. Per curiam. Exceptions overruled on the authority of *Andrews v. Wahinenui*, ante, p. 260. *Castle & Withington* for plaintiff. No appearance for defendant.

No. 53. JOHN F. COLBURN v. IRENE B. CORNWELL AND A. M. BROWN, HIGH SHERIFF. Submitted December 6, 1904. De-

cided January 27, 1905. This is an application for a writ of prohibition directed to the district court of Honolulu to restrain said district court from further proceeding in the case of *Irene B. Cornwell, plaintiff, v. John F. Colburn, defendant*, a proceeding to obtain summary possession of land under the landlord and tenant act.

A judgment was rendered in said district court in said action in favor of said Irene B. Cornwell on the 4th day of September, 1903, by which a lease held by said Colburn was declared forfeited for breach of condition, to wit: failure to pay an installment of rent amounting to \$37.50, which fell due on March 7, 1903, and for failure to pay taxes upon the property demised by said lease. An appeal was taken from said judgment to this court. On the 6th day of May, 1904, this court rendered a decision sustaining the judgment appealed from. On the 7th day of May, 1904, before a writ of possession had issued on said judgment of said district court, said John F. Colburn filed with the said district court a bond, and on the 9th day of May, 1904, paid all costs in said action, both in the district court and in the supreme court, and likewise paid all taxes due upon the demised premises; on said 9th day of May said Colburn also tendered to the attorneys of said Irene B. Cornwell the rent at that date due under said lease, to wit: three instalments of \$37.50 each; on or about the 18th day of May, 1904, the attorneys for said Irene B. Cornwell moved said district court for a writ of possession; said John F. Colburn appeared and opposed said motion and again made tender of the sum of \$116.98 as and for all rent then due and interest thereon; on the 25th day of May, 1904, said district court issued a writ of possession on said judgment. The petition for a writ of prohibition was filed in this court by said Colburn on the 25th day of May, 1904, at 9:25 o'clock, p. m. The answer of the high sheriff sets out that the writ of possession in said action of *Irene B. Cornwell v. John F. Colburn*, issued by the district court for the district of Honolulu, was placed in his hands shortly before noon on the 25th day of May, 1904; that he thereupon caused said writ

to be executed and restored said Irene B. Cornwell to the possession of the premises named therein and that said writ was fully served and executed prior to 5 o'clock, p. m. on said 25th day of May, 1904. Per curiam: The writ of possession having been fully executed prior to 5 o'clock, p. m. on the 25th day of May, 1904, the writ of prohibition issued at 9:25 o'clock, p. m. of said day was ineffectual; no act remaining to be done on the part of said district court in respect to which said writ of prohibition could operate. A writ of prohibition cannot be made to take the place of a writ of error. Petition dismissed and temporary writ dissolved. *C. W. Ashford* for petitioner. *Robertson & Wilder* for respondent.

No. 57. J. J. BYRNE V. ORPHEUM COMPANY, LIMITED.
Appeal from order of the first judge of the first circuit court, at chambers. Submitted December 5, 1904. Decided December 27, 1904. This was an action of assumpsit on defendant's promissory notes in the circuit court of the first circuit. Summons issued December 15, 1903; service of process December 16; answer filed January 6, 1904, being twenty-one days after service, no order of default having been then entered or moved for. January 7 the plaintiff filed in the circuit court of the first judicial circuit, at chambers, his motion for an order of default based upon a certificate of the clerk dated January 6 that more than twenty days had elapsed since service on the defendant, and that defendant had not "filed any pleading or papers other than a document called an answer entitled in this court and cause and reading as follows: 'And now comes the said defendant the Orpheum Company, Ltd., by C. W. Ashford, its attorney, and denies each and every, all and singular the allegations contained in plaintiff's declaration on file herein.' Dated this 6th day of January, 1904. (Sgd.) C. W. Ashford, attorney for defendant." January 9 the first judge of the circuit court, at chambers, made and filed an order reciting that

"plaintiff's claim is based upon certain promissory notes made by defendant and that defendant has not, nor has any one on its behalf filed within the time allowed by law any pleading in conformity with law, the so-called answer filed on January 6, 1904, not being such as is required," and ordering that defendant "is declared in default and the clerk of this court is hereby authorized to assess the amount of plaintiff's claim, principal, damages and to enter up judgment therefor and for the costs." The defendant then asked leave to file a verified answer which the court denied. Judgment accordingly was entered January 11. The defendant appealed from the foregoing order, ruling and judgment. Per curiam: The defendant's contention that section 1145, C. L., as amended by act 32, Laws of 1903, pp. 203, 204, repeals by implication the provisions of sections 1242, 1243 and 1244, C. L., is not sustained, the amended section not purporting to be exclusive and the sections referred to being in no respect inconsistent therewith. The order of default was authorized by the showing made, and it does not appear that in refusing to open the default there was any abuse of discretion, no meritorious defense having been suggested other than a verified answer. The appeal is dismissed. *Thayer & Hemenway* for plaintiff. *C. W. Ashford* for defendant.

No. 58. WASHINGTON MERCANTILE COMPANY, LIMITED, v. WILLIAM A. HALL. Exceptions from circuit court of the first circuit. Submitted December 5, 1904. Decided December 27, 1904. The plaintiff brought assumpsit before the district magistrate of Honolulu upon the defendant's promissory note. The magistrate rendered judgment for the plaintiff and the defendant appealed to the circuit court of the first circuit, waiving jury, and the case stood on the calendar of the January, 1904, Term as number 463. By an order made December 17, 1903, signed by the three judges of the circuit court of the first judicial circuit, all odd numbered civil cases on the calendar were

assigned to the first judge, all even numbered civil cases to the second judge, and all criminal cases to the third judge, who was also designated as "presiding at said term." Said order also provided: "1. All cases in which neither party answers ready will be peremptorily continued for the term or dismissed as in the discretion of the court may appear proper." "8. The calendar will be called from time to time as occasion requires, of which calling counsel will be notified through the press and otherwise." By an order made by the first judge of said court on December 31, 1903, all odd numbered cases on the jury waived calendar were called for disposition at nine o'clock in the morning of January 4, 1904, the opening day of the January, 1904, Term, at which time no appearance being made for either plaintiff-appellee or defendant-appellant, the appeal was dismissed. January 8 the defendant moved the court to re-instate the case and vacate the order dismissing the same, basing the motion on the ground that the circuit court had not been opened at the time when the order was made; that the third judge, who had been assigned and selected as the presiding judge of the court at the January Term, did not open the term until ten o'clock a. m. on January 4, the order dismissing the defendant's appeal having been made at about nine o'clock on the same day and before the term had been legally and regularly opened for business by the said third judge or by any other judge or person competent to open said term; that the absence of defendant's attorney at nine o'clock on January 4, when the order was made, was the result of mistake and inadvertence on his part; that the order dismissing the appeal was an abuse of discretion. The defendant excepted to the denial of this motion. Per curiam: Apparently both parties were ignorant of or misapprehended the order made by the first judge December 31 that the jury waived calendar would be called at nine o'clock in the morning of January 4. Without deciding upon the validity or invalidity of any term acts of the first judge done prior to ten o'clock on January 4, at which hour the term was formally opened, we think that this is a case in which it

would be proper that the order of dismissal be rescinded and the cause remanded to the circuit court of the first circuit for trial or such other proceedings as may be appropriate, and it is so ordered. The exceptions are sustained. *Thayer & Hemenway* for plaintiff. *C. W. Ashford* for defendant.

NO. 63. YOUNG HIN ET AL., PLAINTIFFS IN ERROR, V. H. HACKFELD AND COMPANY, LIMITED, AND HONOKAA SUGAR COMPANY, LIMITED, DEFENDANTS IN ERROR. Motion of plaintiffs in error in two cases entitled as above for rehearing on the following grounds: "1. The supreme court in its decision in said cases rendered January 28, 1905, overlooked and did not consider the following matters which are decisive of said case which plaintiffs in error called to the attention of the court in their brief: a. That the district magistrate had no jurisdiction over the matter of the garnishment proceedings for lack of a written petition, which this court has held to be necessary in *Frag v. Alams*, 5 Haw. 664. The court's decision misconstrues the contention of plaintiffs in error to be that the garnishee summons fails to contain a petition for process against the garnishee. Such was not the contention for the summons does contain a recital of such a petition, but the contention is that under said ruling in *Frag v. Adams* to give a district magistrate jurisdiction there must not only be a summons but also a written petition. A summons signed by a district magistrate, no matter what may be its recitals is not the written petition of the plaintiff. b. That if the district magistrate took judicial notice of his judgment of two days before, he should have taken judicial notice that that was a judgment given without jurisdiction over the garnishees in that case and without evidence against most of them; in that there was no written petition for process in that case; and that most of the garnishees were unserved and no evidence was given that garnishees were partners or jointly liable in any sum to the defendants in that case. 2. That the deci-

sion is largely based on a point not raised by either plaintiffs in error or defendants in error and decided without hearing argument thereon and that on said point the decision is incorrect and contrary to a controlling statute of the Territory to which the attention of the court was not drawn. The said point is that 'plaintiffs in error cannot assign errors committed against a co-defendant where rights as in this case are not affected by the error.'". Argued March 8, 1905. Decided, March 10, 1905. Per curiam: The motion is denied. *Lyle A. Dickey* for plaintiffs in error. *C. Brown, F. E. Thompson* and *C. F. Clemons* for defendants in error.

No. 64. YOUNG HIN, WONG TAI, WONG WAH, CHU LUM CHEE, CHU KOW, YOUNG LIN, YOUNG CHONG, LAM TAI, CHU KING, SAM SUN, LEE WO, CHAN WING, AH SUN, CHAN SING, LUNG YEE, CHAN HANG, HIN YORK, LEE CHIN, SEE SING, SEE CHONG, CHAI LEP SING AND CHU CHEE, PLAINTIFFS IN ERROR, v. H. HACKFELD AND COMPANY, LIMITED, A HAWAIIAN CORPORATION AND HONOKAA SUGAR COMPANY, LIMITED, A HAWAIIAN CORPORATION, DEFENDANTS IN ERROR. Writ of error to the district magistrate of Honokaa, island of Hawaii. Submitted January 3, 1905. Decided January 28, 1905. Per curiam: The writ of error is dismissed, following decision this day made in another case between the same parties. *Lyle A. Dickey* for plaintiffs in error. *C. Brown, F. E. Thompson* and *C. F. Clemons* for defendants in error.

No. 65. YOUNG HIN, WONG TAI, WONG WAH, CHU LUNG CHEE, CHU CHEE, CHU KOW, YOUNG LIN, YOUNG CHONG, LAM TAI, CHU KING, SAM SUN, LEE WO, CHAN WING, AH SUN, CHAN SING, LUNG YEE, CHUN HANG, HIN YORK, LEE CHIN, SEE SING, SU CHONG AND CHAI LEP SING, PLAINTIFFS IN ERROR, v. VON HAMM YOUNG COMPANY, LIMITED, A HAWAIIAN CORPO-

RATION, AND HONOKAA SUGAR COMPANY, LIMITED, A HAWAIIAN CORPORATION, DEFENDANTS IN ERROR. Error to the district court of Honokaa, island of Hawaii. Submitted January 3, 1905. Decided January 31, 1905. The defendant in error, Von Hamm Young Company, Ltd., brought an action in the district court of Honokaa against certain defendants doing business under the name of Kwong Yick Company, and the plaintiffs in error, known as "Young Hin Gang No. 5," as garnishees. Judgment was rendered by default against the garnishees in that case. A few days later the defendant in error, Von Hamm Young Company, Ltd., brought an action upon that judgment against the Kwong Yick Company as defendants and the Young Hin Gang No. 5 and the Honokaa Sugar Company, a corporation, as garnishees. The Young Hin Gang No. 5 made no appearance. The Honokaa Sugar Company answered admitting that it owed the Young Hin Gang No. 5 more than the amount of the judgment, although that amount was not due at that time. Judgment was rendered against the Honokaa Sugar Company to pay the amount of the previous judgment, attorneys' fees and costs amounting to \$315.25. The Young Hin Gang No. 5 brings this writ of error to set aside the second judgment, assigning a number of errors, one of which is that no jurisdiction was acquired by the district court over the Young Hin Gang No. 5 for the reason that no proper service was made upon the members of that company, the return of service being as follows: "Served the within summons on Kwong Yick Co. and Young Hin Gang No. 5, therein named as defendant by handing him a true and attested copy thereof and at the same time showing him the original, at Honokaa, this 19th day of May, 1904. J. Kaiula, police officer." Per curiam. The district court acquired no jurisdiction over the plaintiffs in error for the reason that no proper service was made upon them and service was not waived by them by appearance or otherwise. Judgment reversed. *L. A. Dickey* for plaintiffs in error. *Thayer & Hemenway* for defendants in error.

NO. 69. R. W. DAVIS, PLAINTIFF IN ERROR, v. MRS. J. A. KING, DEFENDANT IN ERROR. Error to district court, Honolulu. Submitted February 20, 1905. Decided March 8, 1905. FREAR, C. J., HARTWELL, J., AND CIRCUIT JUDGE DE BOLT IN PLACE OF WILDER, J. Assumpsnt by defendant, who was plaintiff below, upon the following instrument: "Honolulu Nov. 8th 1-8. On demand I promise to pay to Mrs. J. A. King or order the sum of one-hundred and sixty dollars (\$160.00), payable monthly in advance. Beginning from the first day of Jan. 1st 1899, at ten dollars (\$10.00) monthly until the sum of one hundred and sixty dollars in full is paid. R. W. Davis." The summons was in the usual printed form, but, instead of containing the complaint in the blank space provided therefor, it contained the words "as per appending declaration," and the complaint, which was apparently too lengthy for insertion in such space, was attached to the printed form. Two errors are assigned: (1) That the complaint does not state facts sufficient to constitute a cause of action—for the alleged reason that the instrument is not a promissory note, though sued on as such, and (2) that the district court was without jurisdiction of the person of the defendant below—for the reason that the return of service endorsed on the summons does not show that a copy of the complaint, as well as of the summons, was served upon the said defendant. Per curiam: (1) The instrument is set forth in the complaint and sued on in haec verba and it is immaterial what the plaintiff called it, whether it was in fact a promissory note or not. (2) The complaint was made a part of the summons by reference, and there is no statute requiring the return endorsed on a summons issued by a district court to refer to the complaint as distinguished from the summons. The judgment below is affirmed. *E. C. Peters* for plaintiff in error. *A. S. Humphreys* and *A. H. Crook* for defendant in error.

NO. 87. IN RE ASSESSMENT OF TAXES, A. PERRY. Appeal from tax appeal court, first taxation division. Argued Novem-

ber 15, 1904. Decided December 14, 1904. Unimproved lot on southeasterly side of Kewalo street, Honolulu, second lot from Lunalilo street; frontage 100 feet, depth 270 feet. Returned at \$3,000; assessed at \$4,000; valued by tax appeal court at \$4,000. Appeal by tax-payer. Further evidence was introduced in this court. Per curiam: Valuation placed at \$3,500. Appellant in person. *Robertson & Wilder* for Assessor.

NO. 93. IN RE ASSESSMENT OF TAXES, H. F. WICHMAN & COMPANY, LIMITED. This is an appeal by the taxpayer from a valuation by a majority of the tax appeal court of \$125,000, the minority finding a valuation of \$97,297.45. The return was \$82,552.22 and the assessment was \$125,000. Argued January 10, 1905. Decided January 27, 1905. *Robertson & Wilder* for the assessor: This concern was assessed as an enterprise for profit. It appears that it dealt in jewelry, optical goods, etc. Its capital stock is \$125,000, all paid up. It made a net profit in 1903 of \$22,762.27, a little over 18 per cent. A witness for the taxpayer testified that a part of these profits did not belong to the corporation, but could not say how much and refused to furnish the information to the court. Consequently the taxpayer has itself to blame for not furnishing any additional information. But, inasmuch as the witness further testified that "the last half of the year was when all the profits were made," it seems that the profits did all belong to the corporation as its return indicates. The statute provides (C. L., Sec. 820), that there shall be taken into consideration the "net profits." A concern that will earn net almost \$23,000 in one year is and must be worth \$125,000. All that the taxpayer can show in order to reduce the assessment is its inventory which it figures at cost and then takes off 25 per cent. From the fact that its personal property is not of a perishable nature it would seem that there is not the depreciation that is found in other kinds of personal property. And also from the large amount

of net profits earned during 1903 it can be seen what the selling prices are in comparison with cost values. The true test is not what the taxpayer's goods would have brought if sold on January 1, 1904, but what could have been obtained if the corporation sold out as a whole on that day. As was said by Chief Justice Frear in 11 Haw. 238, the earning power is one of the most potent factors in determining the value of an enterprise for profit.

Smith & Lewis for the appellant: It appears that prior to July, 1903, the business of H. F. Wichman & Co., Ltd., had been conducted solely by Mr. Wichman under the name of H. F. Wichman & Co. During the month of July, 1903, Mr. Wichman incorporated his business under the corporate name of H. F. Wichman & Co., Ltd., with a capital stock of \$125,000, the assets of the corporation being solely the assets of the business formerly conducted by Mr. Wichman under the name of H. F. Wichman & Co. No additional capital was placed in the business. The stock of the corporation is held principally by Mr. Wichman, a few shares being given to some employees in the business at the time of the incorporation. The corporation remained strictly a private one, the stock of which is not upon the market. No share of stock has been sold and none is for sale. The corporation made its return, as did Mr. Wichman in former years, under Schedule E, of personal property, the items composing the assets of the business aggregating \$82,552.22. The assessor raised the assessment to \$125,000 upon the basis that the business was one conducted as a business enterprise for profit known as H. F. Wichman & Co., Ltd.

The first point contended for by appellant is that our tax law on the question of enterprises for profit does not apply to corporations such as H. F. Wichman & Co., Ltd., which is simply a private mercantile business with no shares of stock on the market, which shares are held only by the owners of the business and his employees. In *Assessment of the Kash Co., Ltd.*, and *Assessment of the Pacific Hdw. Co., Ltd.*, 15 Haw. 476-8-9, the supreme court held that the value of a merchant's stock of

goods is what such goods, wares and merchandise would bring at a sale for cash, said goods to be sold all on one day either as a whole or in lots or parcels, or in whichever manner would bring the best prices. To tax the taxpayer on the basis of supposed income alone, as is done in this case, is a confounding of the income tax law with the property tax law. The basis of the assessor's assessment is simply a tax based upon supposed profits and not a tax on the property itself. The tax assessor may say that his assessment is right irrespective of his method. We contend that his method is erroneous as it gives us wrong results. Granted, for the sake of argument, that this taxpayer is taxable as an enterprise for profit under the meaning of the statute, then, nevertheless, the situation is not changed for the statute provides that the said property "shall be assessed as a whole on its fair and aggregate value." The testimony of Mr. Wichman is that his whole business could not be sold for more than the amount of the return.

Per curiam: The appellee's case is within the provisions of section 820, C. L., since there are "several classes or kinds of personal property" which "are combined and made the basis of an enterprise for profit," requiring the property to "be assessed as a whole on its fair and reasonable aggregate value." The statute requires that "in estimating the aggregate value there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses." Ib. It is also proper to take into consideration the chances of depreciation in value and that, as in this case, the inventoried value includes book accounts; but not the fact that it includes accumulated profits. As stated in 11 Haw. 258 the earning power may be "one of the most potent factors in determining the value," but other factors above mentioned are properly considered. Apparently the majority of the tax appeal board confined their consideration of value to the item of profits. We think on the whole that the inventoried value, namely, \$104,539.10, would be an appropriate assessment, and it is so ordered. *Smith & Lewis* for appellant. *Robertson & Wilder* for assessor.

No. 94. S. M. BALLOU v. MUTUAL TELEPHONE CO. DECREE. The decree appealed from is affirmed, with the following modifications to be made by the circuit judge: The decree shall be amended by adding to the second paragraph thereof the following words: "Provided, however, that the defendant may apply to the circuit judge from time to time for modifications of the above injunction under changed conditions, and may make repairs in the service at reasonable hours." The case is remanded to the circuit judge for the purpose of making such modifications.

No. 98. IN RE ASSESSMENT OF TAXES OF C. H. SMITH, Appeal by the assessor from tax appeal court, first taxation division. Frear, C. J., Hartwell, J., and Circuit Judge De Bolt in place of Wilder, J. Argued March 13, 1905. Decided March 17, 1905. The taxpayer claimed a deduction of \$148.80 from his income for necessary expenses incurred in carrying on his business as a surveyor, being the cost of instruments, books, etc., used by him. The tax appeal court sustained this claim and the assessor appealed from its decision. Per curiam: The decision of the tax appeal court is reversed. The deduction claimed cannot be allowed. *A. G. M. Robertson* for assessor. No appearance for taxpayer.

No. 99. IN RE ASSESSMENT OF TAXES T. A. HAYES. Appeal by the assessor from tax appeal court, first taxation division. Frear, C. J., Hartwell, J., and Circuit Judge De Bolt in place of Wilder, J. Argued March 13, 1905. Decided March 17, 1905. The assessor added to the taxpayer's return of his income the sum of \$1,500, being the sum allowed him by his employer, the Pacific Hardware & Steel Company, of San Francisco, for his expenses during the year, at the rate of \$125 a month. The taxpayer claimed that this was no portion of his income and that the assessor had no authority to add any item to his return.

Per curiam: The statute does not require the assessor to take the taxpayer's return of his income as true. The item in controversy was properly added by the assessor, forming an actual part of the taxpayer's income. The decision of the tax appeal court is reversed. The assessment made by the assessor stands. *Castle & Withington* for taxpayer. *A. G. M. Robertson* for assessor.

No. 100. *N. P. FERREIRA V. HONOLULU RAPID TRANSIT & LAND COMPANY, LIMITED.* Exceptions from circuit court, first circuit. Submitted January 9, 1905. Decided January 16, 1905. Frear, C.J., Hartwell and Hatch, JJ. Exceptions. A bill of exceptions, including exceptions to rulings taken during the course of a trial, and an exception to the overruling and motion for a new trial, cannot be dismissed in consequence of defects in connection with the motion for a new trial. As to exceptions taken during the trial, the bill of exceptions being perfected and allowed, will be retained. Choice of remedies: Where a party has appealed a bill of exceptions and has also sued out a writ of error covering the same matters he will be obliged to elect which procedure he will follow. Per curiam: The plaintiff moves that the defendant's bill of exceptions be stricken from the calendar on the grounds that the defendant's motion for a new trial, the rulings upon which constitute one of the grounds of exception, was improperly entertained by the trial court, a sufficient bond not having been filed with the motion conditioned not to remove or dispose of any property to the detriment of the plaintiff liable to execution, and costs not having been paid on the filing of said motion; and for the further ground that a writ of error has been sued out by the defendant raising identically the same questions which are set out in the bill of exceptions.

The case was tried at the April term 1904. A verdict was found for the plaintiff on the 30th day of April. On the 5th day of May the defendant filed a motion for a new trial and a

bond in the sum of \$25, conditioned to pay all costs of the motion and that the defendant should not to the detriment of the plaintiff remove or otherwise dispose of any property it might have liable to execution on the judgment. The verdict was for the sum of \$3,000. On May 13th the plaintiff moved that the defendant's motion for a new trial be stricken from the files on the grounds of insufficiency of the bond filed and failure to pay costs. This motion was overruled and on May 14th a further bond for \$3,100 was filed by the defendant, conditioned as was the first bond. The bond last named was filed too late. The requirement that a sufficient bond should be filed was jurisdictional. The bond for \$25 was not a sufficient bond for securing the plaintiff's rights under his verdict for \$3,000. A sufficient bond not having been filed the court below had no jurisdiction to entertain the motion for a new trial, and the exception to the ruling of the court on said motion cannot here be entertained. *Gonsalves v. Brito*, 8 Haw. 255.

The defendant's bill of exceptions however incorporates numerous exceptions to rulings made during the course of the trial. An order was obtained on the 13th day of May, 1904, granting the defendant additional time in which to file its bill of exceptions; the time given being ten days after the completion and delivery of the transcript of evidence. This order being obtained within twenty days after the verdict, was effectual to save defendant's rights. The transcript of evidence was completed and placed on file October 27th, 1904. The bill of exceptions was presented to the trial judge on the same date and was allowed by the judge and filed on the 18th day of November, 1904. In addition to the bond for \$3,100, costs were paid by the defendant, and the sum of \$25 deposited in lieu of bond for future costs on the 17th day of May, 1904. The bill of exceptions therefore, as to all of the exceptions taken during the course of the trial, is properly before this court.

The defendant however on the 29th day of October, 1904, sued out a writ of error setting out, in its assignments of errors, matters which the plaintiff claims are identical with the mat-

ters brought up for review by the defendant's bill of exceptions. The identity of the questions raised by the bill of exceptions on the writ of error is not denied by the defendant. Under these circumstances we consider that the defendant should elect between the two remedies. Though the remedies are concurrent it does not follow that the party is entitled to both of said remedies at the same time, any more than he would be entitled to maintain two actions for the same cause in courts of concurrent jurisdiction. The defendant is given five days in which to elect which remedy he will pursue. *E. M. Watson, Holmes & Stanley* for plaintiff. *Castle & Withington* for defendant.

No. 111. *W. KAPEPEE v. KUPAHI AND KOOLAU*. Error to circuit court, fifth circuit. Submitted March 14, 1905. Decided March 17, 1905. Frear, C. J., Hartwell, J., and Circuit Judge De Bolt in place of Wilder, J. The only error now relied on by the defendants, who are the plaintiffs in error, is that the judgment entered below is void for the reason that there was no decision in writing as required in a jury waived case by Revised Laws, section 1747, and *Maalo v. Kaiapa*, 11 Haw. 705. It appears that judgment was rendered orally August 19, 1904, at the close of the trial, and that judgment was entered September 5, 1904, as of the July term, 1904, this judgment being in the usual form excepting that it also sets forth various findings not usually set forth in formal judgments. It is signed by the judge as well as by the clerk. The statute requires that the decision in a jury waived case "shall be rendered in writing." Per curiam: The statute was sufficiently complied with, and *Maalo v. Kaiapa* does not apply. Judgment affirmed. *J. D. Willard* and *M. F. Prosser* for plaintiff. *S. K. Kaeo* for defendants.

No. 129. *THE FIRST AMERICAN SAVINGS & TRUST COMPANY OF HAWAII, LTD., A CORPORATION, v. MARY JANE MON-*

TANO AND A. A. MONTANO. Appeal from circuit judge, first circuit. Submitted April 4, 1905. Decided April 10, 1905. Decree foreclosing mortgage and rendering deficiency judgment against married woman and husband. Per curiam: Deficiency judgment on foreclosure of mortgage may be rendered against a married woman. See Revised Laws, Secs. 2251-2252. Decree affirmed. *J. Alfred Magoon* and *J. Lightfoot* for respondent-appellant. *C. A. Long* and *E. A. C. Long* for complainant-appellee.

No. 131. CHANG KIM v. C. LAI YOUNG. Motion by L. A. Dickey as trustee for Grace D. Merrill for an order to the clerk to pay him \$97.30, paid to the clerk by the high sheriff upon an execution in this case. Submitted January 3, 1905. Decided January 28, 1905. The facts are as follows: The defendant herein, C. Lai Young, obtained a judgment against one Pomai-kai in the district court of Koolaupoko, island of Oahu, which was assigned to the movant Dickey, and in execution upon which the deputy sheriff of that district collected the money now in question. In the present case the plaintiff, Chang Kim, obtained a judgment against the defendant C. Lai Young, in the district court of Honolulu and upon execution, which was issued against the personal property, being returned unsatisfied, a certified copy of the judgment was filed in the supreme court, and a document purporting to be a judgment of the supreme court, based on the judgment of the district court, was also filed and execution issued thereon. The high sheriff, to whom the writ of execution was directed, collected the money now in question from the deputy sheriff of Koolaupoko, who had not returned the execution in the other case to that court or paid the money over to the plaintiff or his assignee therein. This money was collected by the high sheriff and paid into this court, on the return of the execution directed to him, after the return day named therein. The movant contends that the collection

of this money and the payment thereof into this court by the high sheriff was without authority on the grounds: that the money in the hands of the deputy sheriff being in custodia legis was not liable to be levied upon; that the levy by the high sheriff was void because made after the return day; that C. Lai Young had no interest in or claim to the money because he had assigned the judgment to the movant; that the supreme court had no jurisdiction to enter judgment in the matter; that the supreme court had no jurisdiction to issue execution because, among other things, the certified copy of the execution issued by the Honolulu district court and the return thereon showed merely that no personal property, and not that no property of any kind, could be found within the district of Honolulu.

Per curiam: Doubtless most if not all of the movant's contentions are sound, but this court is not one of original jurisdiction and should not, especially under the circumstances of this case, undertake to decide questions of fact and that, too, upon a motion made by one in a case to which he is not a party, and accordingly the motion is denied.

A motion was made by the defendant herein several months ago that the alleged judgment entered by the clerk of this court herein be vacated and the execution issued thereon be set aside, but that motion was dismissed for want of prosecution without inquiry into its merits. The matter now having come to the attention of the court, the court of its own motion orders the document purporting to be a judgment of this court in this case to be stricken from the files and the execution issued thereon to be set aside. *C. W. Ashford* for plaintiff. *C. F. Peterson* for defendant. *L. A. Dickey*, movant, in person.

NO. 143. JOHN LUCAS V. THE AMERICAN-HAWAIIAN ENGINEERING AND CONSTRUCTION COMPANY, LIMITED, C. S. HOLLOWAY, SUPERINTENDENT OF PUBLIC WORKS OF THE TERRITORY OF HAWAII, AND J. H. FISHER, AUDITOR OF THE TERRI-

TORY OF HAWAII. Petition for rehearing. Submitted August 15, 1904. Decided August 15, 1904. The original decision is reported *ante* p. 80. Per curiam: The petition is denied. *Kinney, McClanahan & Cooper* for plaintiff. *Castle & Withington* for defendant corporation, the petitioner for rehearing.

No. 149. IN RE ASSESSMENT OF TAXES, HONOLULU RAPID TRANSIT & LAND COMPANY. Appeal from tax appeal court, first taxation division. Submitted May 4, 1905. Decided May 6, 1905. Circuit Judge De Bolt in place of Wilder, J. Land, buildings, power plant, track, overhead line, rolling stock, electrical equipments, tools, supplies, etc., assessed as a whole as an enterprise for profit as of January 1, 1904. Returned at \$682,082.80; assessed at \$1,409,200; assessment reduced by tax appeal court to \$1,351,015.95. Appeal by taxpayer as to excess over \$1,000,000. The tax appeal court pursued the method which was held not to produce an excessive result in the case of this taxpayer in 15 Haw. 3, as follows:

8,000 shares of common stock at the market value	
of \$82.50	\$ 660,000.00
3,390 shares preferred stock at market value of	
\$100	339,000.00
	<hr/>
Total	999,000.00
Less 20%	199,800.00
	<hr/>
Leaving	799,200.00
\$610,000 bonds, less 5%	579,500.00
	<hr/>
Total	1,378,700.00
Less material not in use	27,684.05
	<hr/>
Balance	\$1,351,015.95

The company set forth its property in its corporation exhibit of December 31, 1903, as of the value of \$1,692,267, including

franchise and subsidies, \$530,000, but it contends that the amounts set forth in that exhibit are a mere matter of book-keeping and do not represent actual values, and that the franchise has no taxable value. This corporation is young and had begun laying its street car tracks only a few years before and was apparently a growing concern. It had already become able to pay 6% on its bonds, 6% on its preferred stock, 4% on its common stock and lay aside considerable as a sinking fund to meet its bonds when they should become due and its stock when the franchise should expire twenty-six years thereafter.

Per curiam: It does not appear that the assessment by the tax appeal court was excessive. Twenty per cent. was a liberal deduction to be made from the value at which the common stock stood in the market as indicated by ordinary sales in small lots. The tax appeal court, however, made the same deduction from the market value of the preferred stock, which could hardly be considered as on the same footing with the common stock, and also allowed a deduction of five per cent. from the bonds, although a purchaser would take the stock or property subject to the payment of the bonds in full at their maturity, and they stood above par in the market at the time. No special circumstances show that the assessment should be reduced. Assessment affirmed. *Cattle & Withington* for taxpayer. *A. G. M. Robertson* for assessor.

NO. 152. *H. G. MIDDLEDITCH, TRUSTEE, v. D. KAWANANAKOA.* Exceptions from circuit court, first circuit. Submitted May 1, 1905. Decided May 2, 1905. Frear, C.J., Hartwell and Wilder, JJ. Attorney's fees in actions of assumpsit when the plaintiff, being an attorney at law, conducts his own case. The statute allowing attorney's fees in actions of assumpsit applies in cases in which an attorney at law is a party and conducts his own case. The plaintiff recovered judgment in an action of assumpsit in the sum of \$616.25 with interest and costs of court. The plaintiff, being an attorney at law, appeared in person. The plaintiff's exceptions present the

question whether the plaintiff appearing in person and acting on his own behalf as plaintiff in this action is entitled to attorney's fees as provided by sections 1889 and 1892 of the Revised Laws upon the judgment rendered in his favor, the trial court having granted the defendant's motion to vacate the order taxing plaintiff's costs of \$59.35. Per curiam: The fact that the attorney in this case is the plaintiff does not deprive him of the statutory right to attorney's fees. The exception is sustained and the order excepted to is set aside. *H. G. Middleditch* for plaintiff. *C. W. Ashford* for defendant.

NO. 157. IN RE TRUSTEES UNDER WILL AND OF THE ESTATE OF BERNICE P. BISHOP, DECEASED. Appeal from circuit judge, first circuit. Submitted May 3, 1905. Decided May 5, 1905. This is an appeal by the trustees under the will of Bernice P. Bishop, deceased, from that portion of an order of a circuit judge of the first circuit, which reads as follows: "It appearing further that under the 13th clause of the said will the trustees thereunder are directed to file with the court annually an 'inventory of the property in their hands and how invested and to publish the same in some newspaper published in Honolulu'; and that the said trustees have complied with the said direction to the extent of filing and publishing an inventory of the personal property belonging to the estate, setting forth the manner in which the same is invested and a statement of all sales, exchanges and acquisitions of real property made since the previous annual account, but that they have neither filed in this court nor published an inventory of all the real property belonging to the estate; it is hereby ordered that the trustees do file in this court and publish forthwith in a newspaper published in Honolulu a full and complete inventory of all of the property belonging to the estate in their hands on the 30th day of June 1904." Per curiam: The order appealed from is affirmed. *Holmes & Stanley* for trustees, appellants.

NO. 158. J. M. VIVAS v. G. AKUNA. Exceptions from circuit court, second circuit. Submitted May 1, 1905. Decided

May 2, 1905. Frear, C.J., Hartwell and Wilder, JJ. Sufficiency of appellant's bond on appeal from district magistrate to circuit court. The bond in this case was sufficient. The plaintiff obtained judgment for \$150 and costs in an action for attorney's fees before the district magistrate of Makawao, Island of Maui. The defendant appealed to the circuit court of the second circuit, filing his bond in the penal sum of \$310, conditioned to "faithfully prosecute his said appeal without delay and faithfully pay unto the said J. M. Vivas the full amount of any judgment including costs that may be rendered or affirmed against him in said appellate court in said cause." The circuit court on the plaintiff's motion dismissed the appeal on the ground that "there is no bond filed for costs in the sum of \$100 as required by law so as to perfect an appeal to a jury, and the bond filed does not cover the required amounts according to law." To this ruling the defendant excepted. Per curiam: By Rule 8 the exception in this case could have been simply stated without bringing up the records in the case. The bond was sufficient to comply with the statute. The exception is sustained and the case remanded accordingly. *A. G. Correa* for plaintiff. *J. L. Coke* for defendant.

No. 159. JOHN H. SCHNACK V. MARY J. MONTANO. Exceptions from circuit court, first circuit. Argued June 5, 1905. Decided June 7, 1905. Assumpsit by broker for commissions on sale of real estate. Verdict for \$1000. The principal exception is to the verdict as contrary to the law and the evidence, the defendant's contention being that by the uncontradicted evidence, after the plaintiff had procured one who was willing to purchase for the amount specified, \$25,000, in case he could obtain the money, and after the defendant had waited a reasonable time, she terminated the plaintiff's authority and afterwards engaged another as broker, who, independently of the first broker, negotiated the sale, although to the person originally procured by the plaintiff. The plaintiff contends that he

was the procuring cause of the sale and that he is entitled to his commissions even though the defendant after attempting to terminate the agency effected a sale through another but to the person procured by the plaintiff. Per curiam: A broker is not entitled to commissions unless he procures a purchaser able and willing to buy; when no time is limited either party may in good faith terminate the agency at will; the broker is not entitled to commissions upon a sale effected thereafter through another broker even though to the purchaser introduced by the first broker, or even though the sale is aided more or less by the first broker's previous efforts, provided the principal acts in good faith; but if the broker procures a prospective purchaser he cannot be deprived of his commissions by the termination of his agency by the principal even though the sale is not consummated until afterwards, provided he was the procuring cause of the sale, or if the principal acted in bad faith for the purpose of avoiding payment of the commissions. In the present case there is much to substantiate the defendant's claim that the agency was terminated in good faith before the consummation of the sale and that the sale was effected subsequently through another broker independently of the first broker, but, on the other hand, there was enough to go to the jury upon the question whether the negotiations with the purchaser were not continuous and whether the first broker's agency was not terminated for ulterior motives. Both the defendant and the purchaser sustained special business relations with the second broker, who was expected by all concerned during the agency of the first broker to finance the proposition for the purchaser and who declined to assist the purchaser until after he had seen the principal and then, according to the purchaser, expressed a willingness to assist, and carried the deal through within a few days after the termination of the first broker's agency. The testimony of the purchaser was to the effect that he regarded all the negotiations as continuous parts of one transaction, and that he was not aware of any change in the agency. The exceptions are overruled. *H. G. Middleditch* for plaintiff. *J. A. Magoon* and *J. Lightfoot* for defendant.

RULES

OF THE

SUPREME COURT.

1. ENTRY OF CASES ON CALENDAR.

1. The clerk shall enter upon the calendar all cases brought to or pending in the court, in their proper chronological order.

2. In appeal cases, the appellant shall notify the clerk when all requirements for entering a case upon the calendar have been complied with. If he fails to do so for ten days after such requirements have been complied with, the appellee may so notify the clerk. Upon receiving such notice the clerk shall enter the case upon the calendar, and the party so notifying the clerk shall forthwith notify the opposing party that the clerk has been so notified. If such notice is given to the clerk before all such requirements have been complied with, the case may be stricken from the calendar.

2. CALL AND ORDER OF CALENDAR.

1. The court will call cases for argument or trial in the order in which they stand on the calendar, except that cases which have counsel on islands other than Oahu may be grouped so as to be heard at one session and except as hereinafter provided. Twenty cases shall be considered as liable to be called at each stated session. Sessions will be held beginning on the first

Monday of each month during the term, unless otherwise ordered.*

2. If the parties, or either of them, shall be ready to proceed when the case is called, the same will be heard, unless otherwise ordered for good cause shown. If neither party shall be ready, the case may be postponed or go to the foot of the calendar, as the court may order.

3. If a case is called at two sessions, and upon the call at the second session neither party is ready to proceed, it may be dismissed unless sufficient cause is shown for further postponement.

4. Criminal cases, cases in which the Territory is concerned and which also involve or affect some matter of general public interest, cases once adjudicated by this court on their merits and again brought up, writs of habeas corpus and extraordinary writs, may be advanced by leave or order of the court.

5. Two or more cases involving the same question may, by leave or order of the court, be heard together, to be argued as one case or more, as the court may order.

6. Any case may, by filed stipulation, be submitted on briefs without oral argument at any time during the term, irrespective of its position on the calendar.

7. Except as aforesaid, no case will be taken up out of its order on the calendar or be set down for any particular day except upon special and peculiar circumstances to be shown to the court.

*Amended April 7, 1905, to read as follows:

"1. The court will call cases for argument or trial in the order in which they stand on the calendar, except that cases which have counsel on islands other than Oahu may be grouped so as to be heard at one session and except as hereinafter provided. Twenty cases shall be considered as liable to be called at each stated session, provided however, that, unless the court shall otherwise order, no case shall be liable to be called except by the consent of the parties thereto until twenty days after it shall have been placed on the calendar. Sessions will be held beginning on the first Monday of each month during the term, unless otherwise ordered."

8. No stipulation or agreement of the parties to advance, pass or postpone a case, or to substitute one case for another, shall be binding upon the court. A case may be so advanced, passed, postponed or substituted only upon application made and leave granted in open court.

3. BRIEFS.

1. At least fifteen days before an appeal case is liable to be called for argument under the rules of this court, the appellant shall file with the clerk of this court three copies of a printed or typewritten brief and serve a copy thereof upon the appellee.

2. At least five days before the case is liable to be called for argument, the appellee shall file with the clerk three printed or typewritten copies of his brief and serve one copy thereof on the appellant.

3. At any time before the first day of the session at which the case is liable to be called the appellant may file a supplemental brief confined strictly to matter in reply to the brief of the appellee.

4. It will be a sufficient compliance with the foregoing provisions of this rule if the briefs are deposited in the mail, duly postpaid and addressed to the office address of the clerk or opposing counsel, as the case may be, in time to reach such address in due course of mail within the times limited in said provisions.

5. When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed; and when an appellee is in default, he will not be heard, except on consent of his adversary or on call of the court.

6. In cases brought originally in this court, briefs shall be filed on both sides at or before the argument, unless otherwise ordered by the court.

7. When evidence is referred to in a brief the page or pages on which it appears in the transcript shall be stated.

4. ORAL ARGUMENTS.

1. The appellant or, in original cases, the petitioner, shall be

entitled to open and conclude the argument of the case; but when the questions on appeal arise solely upon demurrer, or otherwise solely upon the pleadings, the order of argument shall be the same as in the court below. When there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Not more than two hours on each side will be allowed for argument without special leave of the court granted before the argument begins.

5. REHEARING.

A petition for rehearing may be presented only within thirty days after the filing of the opinion or the rendition of judgment unless by special leave granted during such thirty days. It shall briefly and distinctly state its grounds and a copy thereof shall be served upon the opposing party, who within ten days from such service may file an answer. If the case has been remitted to the lower court, it may be recalled for the purposes of the petition for rehearing.

6. MOTIONS.

1. All motions shall be reduced to writing. No facts will be considered unless shown by the record or by affidavit.

2. A copy of the motion shall be served on the opposite party not less than forty-eight hours before the hearing, unless otherwise ordered by the court.

3. The motion day shall be the first day of each stated session.

4. Any motion of which notice shall have been given to the clerk in advance, shall be entered on the clerk's list in the order in which he receives such notice, and shall have priority in that order before other motions.

5. Not more than half an hour on each side shall be allowed for argument of a motion, without special leave of the court before the argument begins.

6. There may be united with a motion to dismiss, a motion to affirm on the ground that, although the record may show that the case is properly before this court, it is manifest that the appeal was taken for delay only or that the question involved is such as not to need further argument.

7. TRANSCRIPTS OF EVIDENCE.

1. A suitable book shall be kept in the office of the clerk of the Supreme Court in which any party, desiring for use on appeal from a Circuit Court, or Judge, a transcript of the notes of evidence taken by a court stenographer in any case, may, after verdict or decision, enter his name, the name of the party he represents, the title of the case, the date of entry, and the name of the stenographer.

The clerk shall forthwith give notice of such entry to the stenographer who took the notes of evidence in the case.

The stenographer shall make and furnish the transcript with all reasonable dispatch in the order of such notice unless otherwise directed by a Justice of the Supreme Court or a Judge of a Circuit Court, and shall note on the transcript the date upon which it is furnished or tendered; and the name of the person to whom it is furnished or tendered; *provided*, however, that in cases in which the stenographer is entitled to payment for such transcript, he may within five days after receiving such notice request in writing the party who made the entry, to deposit cash, or furnish security, within ten days after such request, sufficient to cover the cost of such transcript, and unless such request is complied with within such time, such entry and notice shall be of no effect and the stenographer need not make such transcript; and *provided* further that after the stenographer shall have made any such transcript for which he is entitled to payment he need not furnish the same until paid for.

In case a party desires to make or procure a transcript or copy of the evidence without the aid of the court stenographer for use on any such appeal, he shall obtain from a Circuit Judge leave to file within a specified time such transcript or copy.

Unless such entry is made or such leave is obtained within ten days after the filing of the notice of appeal or bill of exceptions or the petition for a writ of error, and unless such transcript or copy of evidence is filed within ten days after it is tendered by a court stenographer or within the specified time when procured without the aid of a court stenographer, such transcript or copy of evidence will not be considered by the Supreme Court upon such appeal, error or exceptions.

2. In cases tried in circuits other than the first, such entry may be made by the clerk of this court upon receipt of a written request therefor which shall have been deposited in the mail and properly postpaid and addressed to him within the time above prescribed for making such entry; and in cases tried in any such other circuit in which the evidence is taken down by a stenographer of the circuit court of such circuit, it will be sufficient if the clerk of the court of such circuit shall keep such a book and such entry shall be made therein and such notice thereupon given by such clerk to such stenographer.

8. BILLS OF EXCEPTIONS.

Bills of exceptions shall contain only such statements of facts or evidence and only such papers as may be necessary to explain the bearing of the rulings upon the issues or questions involved; undisputed facts shall be so stated, and not the evidence from which they are or may be deduced.

9. WRITS OF ERROR.

Cases brought up by writ of error, as well as those brought up by appeal or bill of exceptions, shall retain the title of the case below without reversing the order of the names.

10. COSTS.

1. Attorneys shall be liable for costs of court incurred by their respective clients.

2. Bonds for costs on appeal to the Supreme Court shall be

made to the Clerk of the Judiciary Department, filed in the court from which the appeal is taken and forwarded by such court to the Supreme Court.

11. REMITTITUR.

1. When a case is remanded to the lower court, an order or mandate to be signed by the clerk, remitting the case, shall be prepared and presented by the prevailing party within ten days after receiving notice of the decision, unless a petition for a rehearing shall have been filed, in which case, such order shall be presented within ten days after the final disposition of the petition for rehearing. If the prevailing party fails to comply with this rule, the losing party may present such an order at any time thereafter.

2. Upon a remittitur, the bill of exceptions, notice of appeal, decision of the court, briefs of counsel, and all original papers filed in the Supreme Court, shall, unless otherwise directed by the court, be kept in the files of the Supreme Court. The other papers shall be returned to the lower court.

12. PAPERS.

No paper shall be taken from the files of the court except by permission of the court or a justice thereof.

13. LIBRARY.

No book, pamphlet or magazine shall be taken from the Library of the Supreme Court (except for use in the Supreme Court or in the Circuit Court of the First Circuit) without the permission of a Justice of the Supreme Court or a Judge of the said Circuit Court.

14. APPEALS FROM DISTRICT COURTS.

District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the Clerk of the Supreme Court a certifi-

cate of appeal, stating the nature of the action, the decision made, and the points of law upon which the appeal is taken; also, the original summons or warrant, all vouchers and exhibits filed, and a transcript of the testimony; also, all costs paid by either party to the action, with a clear and itemized statement showing by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what is kept back.

15. DEFENSE OF TITLE IN DISTRICT COURTS.

Whenever, in the District Courts, in defense of an action of trespass, or a suit for the summary possession of land, or any other action, the defendant shall plead to the jurisdiction in effect that the suit is a real action, or one in which the title to real estate is involved, such plea shall not be received by the court, unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim.

16. ADMISSION TO THE BAR.

1. Each applicant for admission to the bar shall file with the clerk an application setting forth his name, age, nationality, last place of residence and the character and term of his study. Sufficient certificates of the applicant's good moral character, and, if he is a member of the bar of any other court, the certificate of admission to such bar, shall accompany the application.

2. No applicant who is not a member of the bar of the highest court of some other state, territory or country, will be admitted or examined for admission to practice in this court unless, as a part of his preparation, he shall have studied diligently at least two years in a law school or the office of a competent attorney, or partly in such school and partly in such office.

3. No person who is not a citizen of the United States will be admitted unless he shall have bona fide declared his intention to become a citizen in the manner required by law.

4. No applicant whose application has been denied shall apply again for admission within one year thereafter.

17. DEFINITIONS.

Within the meaning of the rules of this court, whenever appropriate, appeal cases include cases brought up on bill of exceptions or writ of error; "appellant" and "appellee" include the plaintiff and defendant in error respectively; and "party," "appellant" and "appellee" and other words denoting the parties include their counsel.

The foregoing rules are hereby prescribed, to supersede all previous rules except those relating to grand juries.*

By the Court:

GEORGE LUCAS,
Clerk.

Honolulu, T. H., September 2, 1904.

*For rules relating to grand juries see 12 Haw. 446.

RESOLUTION.

WHEREAS it has pleased Almighty God to remove by death GARDNER K. WILDER, Esq., a member of the Bar of this Court;

RESOLVED, That the members of the Bar hereby express their deep sorrow at the death of their deceased brother and desire to pay this last tribute of respect to his memory;

RESOLVED, That we hereby express to the family of the deceased our sincere sympathy with them in their bereavement.

We would respectfully move that these resolutions be ordered to be spread upon the records of the Court.

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CERTAINTY.

See INDICTMENT, 2, 3, 5.

CERTIFICATE OF ACKNOWLEDGMENT.

The words "for the uses and purposes therein set forth" are not essential in a certificate of acknowledgment. *Haw. T. & Invest. Co. v. Barton*, 294.

COMMERCIAL PAPER.

See NEGOTIABLE INSTRUMENTS.

COMMON LAW.

Common law concerning merger to defeat contingent estates not adopted in Hawaii. *Godfrey v. Rowland*, 377.

CONSTITUTIONAL LAW.

1. The legislature may determine what courts shall have jurisdiction to issue writs of habeas corpus. *High Sheriff v. Goto*, 263.
2. Double taxation need not violate the constitutional guaranty of due process of law. *In re taxes Agency Contracts*, 584.
3. The legislature may change the number of judges of the circuit courts. *Territory v. Boyd*, 660.
4. A speedy trial is not denied by continuance to a term beginning in one week. *Territory v. Johnson*, 743.
5. A statute which creates counties does not embrace more than one subject because it transfers many duties of Territorial officers to county officers and covers distinct changes in pre-existing laws affecting the whole systems of the Territorial government. *Castle v. Secretary of the Territory*, 769.

CONSTRUCTION.

1. "Estate of A. B. deceased" means estate which belonged to A. B. deceased. *Territory of Hawaii v. Nobriga*, 29.
2. "Of" does not necessarily refer to present possession. *Ibid.*
3. A proviso in a statute does not always apply only to the paragraph or clause immediately preceding it. *Cooper v. Island Realty Co.*, 92.
4. In construing a doubtful provision of an act other provisions, the reason and spirit of the act as a whole, the circumstances under which it was adopted and the history which preceded it may be considered and weight given to long continued unquestioned contemporaneous construction. *Carter v. 2nd Judge 1st Circuit*, 242.
5. A verdict in ejectment in favor of plaintiff for damages only, construed to include a verdict for the land claimed. *How On v. Ah Ho*, 669.
6. General description controlled by specific. *Haw. Trust Co. v. High Sheriff*, 689.

CONTRACT.

1. There is no implied contract between the owner of a building and a subcontractor for materials furnished a contractor and used in the building. *Allen & Robinson, Ltd., v. Reist*, 23.

CONTRACT.—Continued.

2. A materialman's lien is dependant upon, though not created by, contract. *Ibid.*
3. The word guarantee may be used to express an original undertaking. *Clark & Henry v. Hackfeld & Co.*, 53.
4. In the case of unilateral contracts the performance of the act specified as the consideration in the offer makes the promise binding. *Ibid.*
5. To enter into an onerous contract with the United States is a sufficient consideration for a contract with another party. *Ibid.*
6. A release of a surety on a bond written on the margin is an independent collateral agreement and not an alteration or spoliation of the bond. *Gay v. Farley*, 69.
7. A taxpayer, without showing special damage to himself may bring suit to enjoin the award of a public contract in violation of law. *Lucas v. Amer.-Haw. Eng. & Const. Co.*, 80.
8. A contract for public work given after advertisement for bids so uncertain as to render intelligent competition impossible is void. *Ibid.*
9. A wife who boards a street car with her husband and whose husband pays her fare may still make an implied contract herself for transportation for breach of which the street car company will be liable. *Rhodes v. Rapid Transit Co.*, 319.
10. When a contract is made with promoters of a corporation with the understanding at the time that it is to be assumed by the corporation when formed, and the corporation is formed and assumes the contract, the promoters cannot be held personally liable on the contract. *Marconi's Telegraph Co. v. Cross*, 390.
11. There may be a contemporaneous oral agreement postponing time of performance of written contract. *Haw. Dredging Co. v. Supt. Public Works*, 638.
12. When one performs services for another with his knowledge and acquiescence a request to perform the service and promise to pay may be implied. *Johnson v. Lee Toma & Co.*, 693.
13. Evidence held to support novation. *Ibid.*
14. Evidence of custom as to pay held not evidence of value of services; custom is unreasonable. *Ibid.*
15. Petition on contracts for public works must show compliance with requirements of statute. *Am.-Haw. Eng. & Cons. Co., Ltd., v. Territory of Hawaii*, 711.
16. There can be no implied contract where a direct one would be invalid. *Ibid.*
17. Assignment of lease by way of gift by husband to wife is not void as a contract between husband and wife. *First Nat. Bank v. Gaines*, 731.

CONTRACT.—Continued.

18. Where an agent makes an unauthorized contract objection on that ground is not waived by an objection on another ground. *Peterson v. Church*, 739.

CORPORATIONS.

1. An admission by defendant that it is a corporation authorized to carry out provisions of a franchise conveyed by an Act dispenses with proof of the Act. *Fuller v. H. R. T. & L. Co.*, 1.
2. A stockholder's right to purchase new shares issued is not income or profits of his shares but belongs to the principal. *In re Cummins*, 185.
3. A trustee holding corporate stock and thereby entitled to buy shares of a new issue is not required to buy them but is liable for the value of the right to purchase them, which he released without charge upon legal advice. *Ibid.*
4. The use of the word "limited" imports a corporation. *Gonsalves v. Watson*, 256.
5. A general denial in a suit by a corporation admits the competency of the plaintiff to sue as such. *Gonsalves v. Watson*, 256.
6. The Bishop of the Roman Catholic Church in Hawaii is not a corporation sole and cannot take title to land by succession from his predecessor in office. *Bishop of Zeugma v. Paahao*, 345.
7. When a contract is made with promoters of a corporation with the understanding at the time that it is to be assumed by the corporation when formed, and the corporation is formed and assumes the contract, the promoters cannot be held personally liable on the contract. *Marconi's Telegraph Co. v. Cross*, 390.
8. Return of service of summons on "H. S. Comp. Ltd., therein named as garnishee by leaving with him a true and attested copy thereof" shows service on Honokaa Sugar Company, Limited, a corporation. *Young Hin v. Hackfeld & Co.*, 427.
9. An appearance by the clerk of the manager of a corporation for the purpose of testifying to indebtedness of the corporation as garnishee will not be presumed to be unauthorized. *Ibid.*
10. One not injured thereby may not complain that a corporation is acting in excess of its powers. *Lord v. Supt. Public Works*, 437.
11. Property of a wireless telegraph company held not exempt from execution on the ground that it is a quasi-public corporation. *Inter-Island Telegraph Co. v. Liliuokalani*, 605.
12. In a suit by a domestic corporation it need not be alleged in the petition that it is domestic. *Am.-Haw. Eng. & Cons. Co. v. Ter. of Hawaii*, 711.
13. Tax assessments. *In re taxes Hon. Rap. Tr. & Land Co.*, 802.

COUNTIES.

1. County Acts of 1905 are not unconstitutional. *Castle v. Secretary of the Territory*, 769.
2. A county act is not inconsistent with Organic Act because it is inconsistent with such duties of Territorial officers as properly are included in duties of county officers. *Ibid.*
3. To place with county attorneys enforcement of Territorial penal laws to exclusion of attorney general would be contrary to Organic Act. *Ibid.*
4. Counties may properly share in Territorial tax money assessed and collected by Territorial officers. *Ibid.*
5. Making the leper settlement a separate county under control of the Board of Health conflicts with no provision of the Organic Act. *Ibid.*

COURTS.

1. The failure to use the words "at chambers" in the title and address of a bill in equity does not deprive the judge of jurisdiction. *Kendall v. Holloway*, 45.
2. The Supreme Court will not issue a writ of *scire facias* on a judgment of 1868 when it appears by the application that the respondent claims by adverse possession. *Punilama v. Mele*, 48.
3. The equity and probate jurisdiction of circuit judges at chambers was not repealed by the Organic Act of the Territory. *Carter v. 2nd Judge 1st Circuit*, 242.
4. Circuit Courts have no jurisdiction to issue writs of habeas corpus in cases in which such writs are not demandable of right. *High Sheriff v. Goto*, 263.
5. A circuit judge at chambers sitting in probate has power in a suit to remove a guardian to enjoin the guardian from proceeding with a partition suit before the judge of another circuit. *Carter v. Gear, Second Judge*, 412.
6. A judge who has presided at the trial of a case is not disqualified from sitting on a motion for a change of venue. *Spreckels v. De Bolt, First Judge*, 476.
7. A circuit court stenographer should furnish free of charge a carbon copy of transcript of evidence to the attorney general upon direction by the trial court. *In re Attorney General*, 483.
8. The legislature has authority to increase the number of judges of the circuit court. *Territory of Hawaii v. Boyd*, 660.
9. A single judge may hold a session of the circuit court of the first circuit. *Territory of Hawaii v. Johnson*, 743.
10. The legislature has power to place upon circuit judges the function of approving bonds of county supervisors and to empower the Supreme Court to deal with contested elections. *Castle v. Secretary of the Territory*, 769.

COURTS.—Continued.

11. The Supreme Court should not decide questions of fact upon a motion made by one in a case to which he is not a party. *Chang Kim v. Lai Young*, 800.

CRIMINAL LAW.

1. ABETTOR. Guilty as principal. *Territory of Hawaii v. Johnson*, 743.
 2. APPEAL. Swords, kimonos, pants, shirt and knife offered as evidence should not be filed in Supreme Court on appeal. *Territory of Hawaii v. Watanabe*, 196.
 3. EMBEZZLEMENT. Of public funds. *Territory of Hawaii v. Wright*, 123; *Territory of Hawaii v. Richardson*, 358; *Territory of Hawaii v. Boyd*, 660.
 4. FISHERIES. Organic Act repealed all criminal laws concerning fisheries. *In re Fukunaga*, 306.
 5. GROSS CHEAT. Instructions. 408.
 6. JEOPARDY. A *nolle prosequi* after an appeal from a district court is no bar to a subsequent trial. *Territory of Hawaii v. Fullerton*, 526.
 7. LARCENY. Allegations as to ownership. *Territory of Hawaii v. Nobriga*, 29.
 8. MURDER. Evidence of intent. *Lo Toon v. Territory of Hawaii*, 351.
 9. PLEA. When plea of guilty has been withdrawn on motion of defendant in order to make plea in abatement with agreement to proceed at once to trial if plea in abatement is overruled, it is not error to proceed to trial without formally again pleading "not guilty." *Territory of Hawaii v. Wong Tim*, 408.
 10. A refusal to allow withdrawal of plea of not guilty for purpose of showing grand jury disqualified is a matter within discretion of trial judge. *Territory of Hawaii v. Johnson*, 743.
 11. SENTENCE. That the record does not show that defendants have been sentenced is not ground for discharge upon motion in Supreme Court. *Territory of Hawaii v. Nobriga*, 29.
 12. SPEEDY TRIAL. Not denied. *Territory of Hawaii v. Fullerton*, 526; *Territory of Hawaii v. Johnson*, 743.
 13. SPIRITUOUS LIQUOR. License to sell required by social club. *Territory of Hawaii v. Pacific Club*, 507.
- See EVIDENCE, 7, 10, 12, 15, 21, 31; INDICTMENT.

CURTESY.

1. An estate of curtesy ceases as to each child's portion upon that child's attaining majority. *Iona v. Uu*, 432.
2. A tenant by curtesy has no authority to lease land beyond age of majority of children. *Ibid*.

DAMAGES.

1. Evidence not too uncertain of damages to taro crop by diversion of water. *Lum Ah Lee v. Ah Soong*, 163.
2. Defendant in action for conversion where there is no original wrongful taking and the property has not deteriorated may surrender it in mitigation of damages. *Pacific Mill Co. v. Enterprise Mill Co.*, 282.
3. Elements of damage caused by refusal of transfer by street railway. *Rhodes v. Rapid Transit Co.*, 319.
4. Contributory negligence—proximate cause. *Ferreira v. H. R. T. & L. Co.* 615.
5. Elements of damage to father caused by killing of his son *Ibid.*

DEATH.

A father may maintain action for damages for wrongful killing of his son. *Ferreira v. H. R. T. & L. Co.*, 615.

DEEDS.

See ACKNOWLEDGMENT.

1. A deed of 50 A. out of a larger tract takes effect as a conveyance of an undivided interest and is not void for uncertainty. *Fisher v. Wailehua*, 154.
2. A deed of life tenant to remainderman will not defeat a contingent estate in the children lawfully begotten of the life tenant if any. *Godfrey v. Rowland*, 377 502.

DEFINITIONS.

1. "Appeal" and "new trial" do not include "motion for change of venue." *Spreckels v. De Bolt, First Judge*, 476.
2. Continuous trip. *Rhodes v. H. R. T. & L. Co.*, 319.
3. A dismissal of a motion is an opinion, ruling or order. *Harrison v. Magoon*, 173.
4. "Indorsement." *Territory of Hawaii v. Johnson*, 743.
5. "Prescriptive" often is used in reference to ancient water rights. *H. C. & S. Co. v. Wailuku S. Co.*, 113.
6. "Property." *In re Trustees under will of Bernice P. Bishop*, 804.
7. Return trip. *Rhodes v. H. R. T. & L. Co.*, 319.
8. "Written decision." *Kapepee v. Kupahi*, 799.

DOWER.

A widow is entitled to dower only after the expenses of administration are paid. *Notley v. Brown*, 575.

EJECTMENT.

1. In an action of ejectment against several defendants there must be but one judgment where there is one cause of action and no separate findings. *Castle v. Kapiolani Estate, Ltd.*, 33.

EJECTMENT.—Continued.

2. A plaintiff who has conveyed title since the beginning of the action cannot recover land. *Andrews v. Wahinenui*, 260; *Andrews v. Kaikena*, 784.
3. A defendant does not have right to open and close case because she admits plaintiff's paper title and has burden of proof. *Trustees Bishop Estate v. Lulia*, 630.
4. A verdict for plaintiff for \$1.00 damages construed to include a verdict for land claimed. *How On v. Ah Ho*, 669.

EMBEZZLEMENT.

1. To be liable under Section 157-8 P. L. it is not necessary that there be express statutes authorizing employment in special capacity or that one be entrusted with the money. *Territory v. Wright*, 123.
2. Evidence held to show embezzlement of public moneys. *Ibid*.
3. Criminal intent may be shown by the doing of wrongful acts knowingly. *Ibid*.
4. Stub books of receipts, and auxiliary cashbook proper evidence and show method of transacting business in office and that no entry has been made of money embezzled. *Ibid*.
5. a clerk of the waterworks is an officer charged with safe-keeping of money within the meaning of embezzlement statute, Act 60 Laws of 1903. *Territory of Hawaii v. Richardson*, 358.
6. When a witness has admitted that he is under indictment for embezzlement defendant is not prejudiced by having indictments ruled out. *Territory of Hawaii v. Boyd*, 660.

EQUITY.

1. In an injunction brought against a public officer by a taxpayer in the interest of the public, the motives of the taxpayer in bringing the suit, such as private vengeance may not be inquired into. *Lucas v. Amer.-Haw. Eng. & Const. Co.*, 80.
2. Jurisdiction of circuit judges at chambers not repealed by Organic Act. *Carter v. 2d Judge 1st Circuit*, 242.
3. A guardian may be enjoined from proceeding with an equity suit for partition by a judge of circuit court sitting in probate in a proceeding for removal of the guardian. *Carter v. 2d Judge 1st Circuit*, 412.
4. A court may limit time within which defendant must appear and may strike from files demurrer filed long after such time. *Hackfeld & Co. v. Achi*, 489.
5. An injunction is not granted to stay waste unless it appear that the injury would be irreparable. *McCandless v. Lee Chew*, 530.
6. As he who seeks equity must do equity, he who is unwilling

EQUITY.—Continued.

- to account cannot compel an accounting. *Macfarlane v Catton*, 544.
7. Injunction will not issue to restrain a malicious and vexatious use of writ of execution as there is a sufficient remedy at law. *Inter-Island Telegraph Co. v. Liliuokalani*, 606.
8. Not correct practice to dismiss a bill at close of plaintiff's case before defendant rests his case. *Territory of Hawaii v. McCandless*, 728.
9. Equity has jurisdiction at suit of taxpayer to enjoin expenditure of public moneys under unconstitutional statute. *Castle v. Secretary of the Territory*, 769.
10. Decree ordered amended to allow modifications of permanent injunction from time to time. *Ballou v. Mutual Tel. Co.*, 796.

ESTOPPEL.

1. Evidence held not to show estoppel of landlord to claim rent. *Silveira v. Ahlo*, 309.
2. A suit to enforce a material man's lien estops the plaintiff from afterwards bringing an action of replevin which assumes property in the plaintiff. *Bierce v. Hutchins*, 418, 717.
3. Where land owner has opportunity and duty to speak and tell her title and allows an administrator under authority of other owner to sell her land by public auction, her silence will equitably estop her from bringing suit for the land. *Peabody v. Damon*, 447.
4. A judgment against executor works no estoppel against the heir as to lands of deceased. *Kapiolani Estate v. Thurston*, 471.

EVIDENCE.

1. An admission by defendant that it is a corporation authorized to carry out provisions of a franchise conveyed by an Act dispenses with proof of the Act. *Fuller v. H. R. T. & L. Co.* 1.
2. Courts will take judicial notice of an act authorizing a street railway. *Ibid.*
3. Evidence held to show lack of due care by motorman to avoid collision at street crossing. *Ibid.*
4. A general objection to evidence on the ground that it is incompetent is insufficient if the evidence is admissible for any purpose or if the objection can be obviated. *Yee Chin v. Atoy*, 17.
5. A mere scintilla of evidence is insufficient to support a verdict. *Ibid.*
6. Secondary evidence of contents of a lost document may be offered upon showing of exhaustion in a reasonable degree of all means of discovery of the instrument. *Wolters v. Redward*, 25.

EVIDENCE.—Continued.

7. A witness may properly testify as to his purpose in being at a certain place. *Territory of Hawaii v. Nobriga*, 29.
8. It is not prejudicial error to rule out proper evidence if the same witness afterwards testifies fully on the subject. *Ibid.*
9. A witness on cross-examination cannot be required to give inferences. *Ibid.*
10. In action for embezzlement, books may be received to show methods of transacting business and that no entry has been made of money alleged to have been embezzled. (Also other rulings.) *Territory of Hawaii v. Wright*, 123.
11. Of damage to taro crop cause by diversion of water. *Lum Ah Lee v. Ah Soong*, 163.
12. Proof of other offenses may be admitted to show guilty knowledge, etc. *Territory of Hawaii v. Watanabe*, 196.
13. Chemist as expert. *Territory of Hawaii v. Watanabe*, 196.
14. The use of the word "limited" by a witness in the name of a firm is evidence that the firm is a corporation. *Gonsalves & Co., Ltd., v. Watson*, 256.
15. Confession held admissible in spite of slight assault two days before by police officer on defendant. *Territory of Hawaii v. Matsumoto*, 267.
16. Of negligence in collision of electric car and wagon. *Dong Chong v. H. R. T. & L. Co.*, 272.
17. Evidence held not to show conversion. *Pacific Mill Co. v. Enterprise Mill Co.*, 282.
18. Values are subject to evidence of opinions of witnesses who may not be experts but have some knowledge on which to base their opinions. *Ibid.*
19. Insufficient to show ratification of new partnership agreement. *Harrison v. Magoon*, 332.
20. Evidence of a partnership as to leaseholds. *Barnes v. Collins*, 340.
21. Evidence of intent to murder. *Lo Toon v. Territory of Hawaii*, 351.
22. The admission in rebuttal of evidence which might have been offered in chief is within discretion of trial court. *Ibid.*
23. Burden of proof is on person contesting legitimacy. *Godfrey v. Rowland*, 377.
24. If husband and wife were living together evidence of adultery of wife is inadmissible to proof illegitimacy. *Ibid.*
25. Evidence that an assignment was made may be given without producing the written instrument. *Marconi's Telegraph Co. v. Cross*, 390.
26. A district magistrate may take judicial notice of a judg-

EVIDENCE.—Continued.

ment rendered by himself two days before. *Young Hin v. Hackfeld & Co.*, 429.

27. Deeds signed by husband and wife are admissible to rebut evidence of a ceremonial marriage of the woman to another man. *Kapiolani Estate v. Thurston*, 471.

28. Conveyances and mortgages by persons out of possession are not admissible to rebut adverse possession. *Ibid.*

29. Declarations made by one in possession of land as to her claim thereto, admissible to prove adverse possession. *Trustees Bishop Estate v. Lulia*, 630.

30. Proceedings on which land commission awards and royal patents are based are admissible only when there is a latent ambiguity to explain. *Galt v. Waianuhea*, 652.

31. A witness for prosecution may be discredited by showing that he is under indictment for the same offense. *Territory of Hawaii v. Boyd*, 660.

32. A defendant may be cross-examined concerning writings shown to him and marked for identification though they are not filed and made evidence. *Ibid.*

33. Minutes of Board of Health. *Kwong Lee Yuen Co. v. Alliance Co.*, 674.

34. Burden of proof—burden of producing further evidence. *Ibid.*

35. An owner of a building, who built it, knows its original cost, and rental value, may properly testify as to these things and the value of the building. *Kwong Lee Yuen Co. v. Manchester Fire Ins. Co.*, 685; *Ahlo v. Royal Ins. Co.*, 737.

36. Evidence of an unreasonable custom as to fees held no evidence as to value of services. *Johnson v. Lee Toma & Co.*, 693.

37. Reputation. *Wong Hoon Kan v. Lui Yan*, 734.

38. Evidence held to show employment of real estate broker by a married woman. *Peterson v. Church*, 739.

39. House journal is not the only evidence of speeches in legislature. *Territory of Hawaii v. Johnson*, 743.

EXCEPTIONS.

1. The Supreme Court will not consider a motion for a defendant's discharge on the ground that the record does not show that defendant has been sentenced when the point is brought before it on exceptions. *Territory of Hawaii v. Nobriga*, 29.

2. An exception to a verdict as contrary to law means as contrary to law as claimed and ruled upon at the trial. *Ibid.*

3. A question as to a defect in an indictment is not raised by an exception to a verdict as contrary to law and the evidence. *Ibid.*

4. Exceptions will not be sustained on grounds not stated in lower court. *Territory of Hawaii v. Wright*, 139.

EXCEPTIONS.—Continued.

5. A bill of exceptions cannot be amended after statutory time by incorporating therein new exceptions. *Kapiolani Estate v. Thurston*, 148.
6. Bill of exceptions to denial of motion for new trial may be presented within twenty days of the denial though not of the judgment. *Harrison v. Magoon*, 170.
7. An exception lies to an order dismissing a motion for a new trial. *Ibid.*
8. A bill of exceptions should contain copies of important documents relied on. *Territory of Hawaii v. Watanabe*, 196.
9. A motion for new trial does not operate as extension of time within which to present bill of exceptions to rulings during the trial to the judges. *Harrison v. Magoon*, 332.
10. Writ of error and bill of exceptions cannot be used at same time. Party must elect one remedy. *Ferreira v. H. R. T. & L. Co.*, 406, 797.
11. The Supreme Court will not allow amendments in the original pleadings when the judgment of the court below was correct and exceptions are overruled. *Harrison v. Magoon*, 485.
12. A general exception to several distinct instructions will not be considered. *Territory v. Johnson*, 743.
13. Exceptions to overruling a motion for a new trial will not be considered where the trial court had no jurisdiction to hear the motion on account of insufficiency in amount of bond. The Supreme Court will consider the question of sufficiency of the bond for new trial as to amount though it be not raised by exceptions. *Ferreira v. H. R. T. & L. Co.*, 797.
14. An exception to ruling as to sufficiency of bond on appeal to circuit court can be brought before Supreme Court without bringing up the records. *Vivas v. Akana*, 804.

EXECUTION.

1. A judgment cannot be levied upon. *Hyman v. Sing Warn*, 106.
2. Property of a wireless telegraph company, not exempt from execution as property of a quasi-public corporation. *Interisland Telegraph Co. v. Liliuokalani*, 605.
3. A part of mortgaged chattels may be levied upon. *Ibid.*
4. An injunction will not be granted against an unnecessary, malicious and vexatious use of writ of execution, as remedy at law is sufficient. *Ibid.*
5. Execution of Supreme Court issued on judgment based on certified copy of judgment and execution of district court ordered set aside. *Chang Kim v. Lai Young*, 800.

EXECUTORS AND ADMINISTRATORS.

1. Commissions not to be allowed on chattels delivered in kind nor on real estate directed by will to be sold but not sold but accepted by legatees in place of proceeds of sale. *Est. of Kraft*, 159.
2. Accounting and commissions. *Estate of Campbell*, 512.
3. Expenses of administration take precedence over debts of decedent and setting apart of dower of widow. *Nolley v. Brown*, 575.
4. Reasonable expenses incurred by executors in proceedings to contest will are expenses of administration. *Ibid.*
5. Demurrer lies to petition to remove executrix. *In re Estate Carter*, 784.

FISHERIES.

The Organic Act repealed all statutes providing a penalty for interference with fishing rights of another. *In re Fukunaga*, 306.

FRAUD.

A failure to acknowledge and record assignment of a lease from husband to wife dated Aug. 20, 1901 until March 11, 1904, when the property was levied on as property of husband does not invalidate it as against the execution creditor. *First Nat. Bank v. Gaines*, 731.

GARNISHMENT.

1. A judgment cannot be garnisheed. *Hyman Bros. v. Sing Warn*, 106.
2. A certificate of a fire claim award cannot be garnisheed. *Ibid.*
3. In a garnishee suit before a district magistrate there need not be a written petition for process if there is a written recital in the summons of such petition. *Young Hin v. Hackfeld & Co.*, 429.
4. Where a court without jurisdiction over a garnishee gives judgment against it, the defendant is not injuriously affected and cannot in a writ of error assign such error. *Ibid.*

GIFT.

Assignment of a lease by a husband to a wife as a gift is valid. *First Natl. Bank v. Gaines*, 731.

GROSS CHEAT.

Instructions. *Territory of Hawaii v. Wong Tim*, 408.

GUARANTY.

The word guarantee may be used to express an original undertaking and is so construed where there is in fact no other principal contract to which the undertaking to guarantee payment could be collateral. *Clark & Henery v. Hackfeld & Co.*, 53.

GUARDIAN AND WARD.

1. A judge sitting in probate may allow fees to counsel representing a ward in an unsuccessful attempt to revoke the order of guardianship, without reference to a jury. *Magoon v Fitch*, 13.
2. The amount of counsel fees allowed in a probate matter is not reviewable in writ of error. *Ibid.*
3. A circuit judge at chambers in probate has power to enjoin a guardian pending proceedings for his removal from proceeding in a partition suit before a judge of another circuit. *Carter v. Gear*, *Second Judge*, 412.

HABEAS CORPUS.

Circuit courts have no jurisdiction to issue writs of habeas corpus in cases in which such writs are not demandable of right. *High Sheriff v. Goto*, 263.

HUSBAND AND WIFE.

1. The statutes concerning marriage do not require a license and ceremony and lack of them do not make a marriage void. *Godfrey v. Rowland*, 377, 502.
2. It is not necessary to the validity of a marriage that a record be kept by the person issuing the license or the one performing the ceremony. *Ibid.*
3. Burden of proof is on party contesting legitimacy, and evidence must be clear, distinct and convincing. *Ibid.*
4. If a husband and wife were living together evidence of adultery of wife is inadmissible to prove illegitimacy. *Ibid.*
5. Presumption of marriage may be offset by presumption that illicit relations continue so until proof of a change of status is offered. *Ibid.*
6. Deeds signed by a man and woman as husband and wife are admissible to rebut evidence of a ceremonial marriage of the woman and a different man. *Kapiolani Estate v. Thurston*, 471.
7. A husband may assign a leasehold to his wife by way of gift. *First Natl. Bank v. Gaines*, 731.
8. An assignment of a lease by husband to wife as a gift is good against subsequent creditors though not acknowledged and recorded until after the lease has been levied on as the property of the husband. *Ibid.*
9. Evidence held to show employment of real estate broker by married woman. 739.
10. Deficiency judgment on foreclosure of mortgage may be rendered against a married woman. *First Am. Sav. & T. Co. of Hawaii v. Montano*, 799.

INDICTMENT.

1. A defect in an indictment for larceny in the averment as to the ownership of property should be raised by demurrer or a motion in arrest of judgment and not by an exception to the verdict as contrary to law and the evidence. *Territory of Hawaii v. Nobriga*, 29.
2. Indictment of public officer for embezzlement need not state when and how appointed and authority for appointment. *Territory of Hawaii v. Richardson*, 358.
3. It is not duplicity to allege an officer to be charged by "law, regulation and appointment" with safe-keeping of public money. *Ibid.*
4. Words "a true bill" and signature of foreman of grand jury at foot of an indictment are an "indorsement." *Territory of Hawaii v. Johnson*, 745.
5. An indictment for conspiracy is not bad for duplicity, though it sets out commission of the offense which was object of conspiracy. *Ibid.*
6. Conspiracy is not merged in completed offense when latter of lesser grade. *Ibid.*

INSANITY.

An adjudication that a person is insane will not affect his power to convey land unless made after notice to him of the proceeding. *Haw. T. & Invest. Co. v. Barton*, 294.

INSTRUCTIONS.

1. Instructions given or refused must be shown to the Supreme Court or it will not consider error in giving or refusing them. *Ter. of Hawaii v. Watanabe*, 196.
2. To give instructions accompanied by remark that they are not given as law of the land is ground for new trial, even though instructions are incorrect. *Ter. of Hawaii v. Wong Tim*, 408.
3. A verdict may be directed for the plaintiff. *Brown v. Braymer*, 548.
4. Not error to refuse inapplicable instructions though correct as abstract propositions or to refuse instructions the substance of which is sufficiently covered by other instructions. *Ferreira v. H. R. T. & L. Co.*, 615.
5. A general exception to several distinct instructions given by court will not be considered by Supreme Court. *Territory v. Johnson*, 743.
6. As to conspiracies. *Ibid.*

INSURANCE.

1. Fire insurance—loss caused by order of civil authority. *Kwong Lee Yuen Co. v. Alliance Co.*, 674; *Ahlo v. Royal Ins. Co.*, 737.

INSURANCE.—Continued.

2. Insurance value not lessened by certainty of fire. *Ahlo v. Royal Ins. Co.*, 737.

INTEREST.

- A verdict for interest is not invalid for uncertainty in an action for rent payable on fixed dates. *Pratt v. Ahin*, 150.

INTERPRETER.

1. Competency of an interpreter is a question of fact not of law and cannot be reversed on error. *Lo Toon v. Territory of Hawaii*, 351.
2. It is presumed that an interpreter is properly sworn. *Ibid.*

INTOXICATING LIQUOR.

1. A social club furnishing liquor to its members and guests should have a license for selling liquor. *Territory of Hawaii v. Pacific Club*, 507.
2. Hotel mortgage held not to cover liquors. *Haw. Trust Co. v. High Sheriff*, 689.

JUDGE.

See COURTS.

JUDGMENTS.

1. An error in a judgment in a jury waived case may be corrected by writ of error. *Castle v. Kapiolani Estate, Ltd.*, 33.
2. In an action of ejectment a single judgment should be entered against several defendants when there is but a single cause of action and no separate findings in the verdict. *Ibid.*
3. Where a trial court has erroneously entered several judgments against defendants and two have been satisfied, the Supreme Court will not amend a judgment but will set it aside. *Ibid.*
4. A judgment cannot be levied upon in execution nor garnished. *Hyman Bros. v. Sing Warn*, 106.
5. An appeal does not lie from a judgment by default. *Kalani-anaole v. Dimond & Co.*, 153.
6. A motion for new trial does not suspend a judgment. *Harrison v. Magoon*, 332.
7. In suit on judgment it is not necessary in complaint to allege ownership of judgment. *Young Hin v. Hackfeld & Co.*, 429.
8. An heir is not estopped in a suit concerning land by a judgment against the executor of decedent. *Kapiolani Estate v. Thurston*, 471.
9. An indefinite continuance by a district magistrate is equivalent to an order of dismissal and appealable. *Correa v. Baldwin*, 782.
10. A judgment in a jury waived case that is signed by the

JUDGMENTS.—Continued.

judge as well as clerk and contains findings is a "decision" "rendered in writing." *Kapepee v. Kupahi*, 799.

11. Judgment of Supreme Court based on certified copies of judgment and execution of district court stricken from files and execution issued thereon set aside. *Chang Kim v. Lai Young*, 800.

JUDICIAL SALES.

See MORTGAGES.

1. A writ of error lies to an order of sale by a receiver and does not require that the purchaser be made a party. *Bierce v. McChesney*, 258.

2. Only questions of jurisdiction and matters subsequent to sale are considered on appeal from order of confirmation. *Ibid.*

3. It is not error in an order of sale to fail to except property in receiver's hands, because of mere claim by another, that is not supported by evidence. *Ibid.*

4. Held sale of ranch in two parcels proper. *Hackfeld v. Achi*, 489.

5. Where live stock is sold with ranch the advertisement should state approximate number of animals. *Ibid.*

JURIES.

See INSTRUCTIONS.

1. A claim in probate by the attorney of a ward may be settled by the judge without reference to a jury. *Magoon v. Fitch*, 13.

2. A mere scintilla of evidence will not support a verdict. *Yee Chin v. Atoy*, 17.

3. Jurors not disqualified by reason of regarding white men as more credible than Chinese. *Wise v. Tong Ong*, 457.

4. A verdict may be directed for the plaintiff where evidence is clear and satisfactory. *Brown v. Braymer*, 548.

5. Where Winnifred H. Babbitt is drawn as juror and Winifred H. Babbitt serves the variance is not fatal as names are idem sonans. *Territory of Hawaii v. Johnson*, 748.

6. It is not sufficient to disqualify a jurymen that he has formed an opinion which it would take evidence to remove. *Ibid.*

7. On objection to a question concerning testimony of a witness at former trial a remark by the judge that he thought similar testimony had been given is not reversible error. *Ibid.*

JURISDICTION.

See COURTS.

LACHES.

Held laches not shown in bringing suit to enjoin govt. contract. *Lucas v. Am.-Haw. Eng. & Const. Co.*, 80.

LANDLORD AND TENANT.

1. An assignment of a lease and acceptance of rent from the assignee does not release lessees from their covenant to pay rent. *Pratt v. Ahin*, 150.
2. Destruction by fire of buildings on leased premises does not operate as surrender of lease. *Silveira v. Ahlo*, 309.
3. Evidence held not to show estoppel of landlord to claim rent. *Ibid.*
4. A lease of premises subject to existing leases does not give lessee a right to collect rent of the existing leases. *Ibid.*
5. A lease of premises "subject to existing leases" gives lessee right to rent of existing leases. *Silveira v. Ahlo*, 701.
6. A tenant acknowledging tenancy cannot claim by adverse possession against owner, after his lease has terminated by termination of the estate of his landlord. *Iona v. Uu*, 432.
7. A man having estate by curtesy has no authority to lease land beyond age of majority of children and any lease so made terminates as to portion of each child as he attains majority. *Ibid.*
8. No disaffirmance of minor's lease necessary prior to ejectment suit by his heirs. *Kekai v. Waipio Limalau, Ltd.*, 464.
9. Rough wooden buildings erected by tenant as stable, rooms for employees, and sheds for washing and painting hacks are removable as trade fixtures, but come within a covenant not to remove erections or additions to the leased premises. *McCandless v. Lee Chew*, 530.
10. An injunction is not granted to stay waste unless it appear that the injury would be irreparable. *Ibid.*
11. A husband can by way of gift assign a lease to his wife, and such assignment is valid against claims of a creditor who has levied on it as property of the husband before acknowledgement and record. *First Natl. Bank v. Gaines*, 731.

LARCENY.

Allegations as to ownership. *Territory of Hawaii v. Nobriga*, 29.

LICENSES.

1. A hack driver may not be refused a license on the sole ground that he does not speak English. Any regulation to that effect is void. *Sakata v. High Sheriff*, 181.
2. A social club furnishing liquor to its members and guests should have a license for selling spirituous liquor. *Territory of Hawaii v. Pacific Club*, 507.

LIEN.

See MECHANIC'S LIEN.

1. After suit for enforcement of materialman's lien the plaintiff is estopped from denying that property is in defendant and

LIEN.—Continued.

- bringing replevin suit. *Bierce v. Hutchins*, 418, 717.
2. A materialman's lien cannot be enforced for lienable items under an entire contract which covers non lienable items. *Ibid.*

MALICIOUS PROSECUTION.

In order that suit may be brought for malicious prosecution, the action complained of must have terminated in favor of the defendant therein. *Wilcox v. Berrey*, 37.

MANDAMUS.

1. Mandamus lies to compel a judge to hear a case which he has declined to hear upon erroneous view that the judge in whose circuit action originated was disqualified to order change of venue. *Spreckels v. De Bolt, First Judge*, 476.

MARRIAGE.

See HUSBAND AND WIFE.

MECHANIC'S LIENS.

1. A materialman's lien is dependant upon contract, though not created by contract. *Allen & Robinson, Ltd., v. Reist*, 23.
2. An owner is not liable upon an implied contract to a subcontractor for materials furnished a contractor and used in the owner's building. *Ibid.*
3. Where in a suit to enforce a mechanic's lien a contract with the owner is alleged, but one with a contractor proved the variance justifies a directed verdict. *Ibid.*
4. A materialman's lien cannot be enforced for lienable items under an entire contract which covers non lienable items. *Bierce v. Hutchins*, 418, 717.

MINORS.

1. A suit in ejectment by heirs of a minor is sufficient disaffirmance of his lease. *Kekai v. Waipio Limalau, Ltd.*, 464.

MORTGAGES.

1. A mortgagor, to obtain the right to charge taxes paid against the mortgagee under §831 Civil Laws must make a return of the amount of mortgage. *Cooper v. Island Realty Co.*, 92.
2. Where a mortgage provides for foreclosure upon non-payment of interest though there be no provision that the whole debt secured shall become due, upon foreclosure enough property should be sold to pay the whole debt and not merely the interest due. *Ibid.*
3. Subdivision of mortgaged property by mortgagor since mortgage does not entitle him to a sale by lots. *Ibid; Desky v. Booth*, 506.
4. A decree of foreclosure for nonpayment of interest should

MORTGAGES.—Continued.

allow redemption at any time before sale upon payment of interest and costs. *Cooper v. Island Realty Co.*, 506.

5. A foreclosure sale should not be made on credit except by consent of parties. *Ibid.*

6. Counsel fees should not be allowed in a foreclosure suit unless stipulated in the mortgage. *Ibid.*

7. A plaintiff in a foreclosure suit should be authorized to become a purchaser at the sale. *Ibid.*

8. An assignee by way of security of mortgage and mortgage note may bring foreclosure suits in his own name. *Hackfeld & Co. v. Achi*, 489.

9. The whole of mortgaged chattels need not be levied on. *Inter-Island Telegraph Co. v. Liliuokalani*, 605.

10. Of hotel property held not to include liquors. *Haw. Trust Co. v. High Sheriff*, 689.

11. Deficiency judgment on foreclosure of mortgage may be rendered against a married woman. *First Am. Sav. & Tr. Co. of Hawaii v. Montano*, 799.

MOTION FOR NEW TRIAL.

1. A bill of exceptions to denial of motion for new trial may be made within twenty days from the decision. *Harrison v. Magoon*, 170.

2. A motion for new trial lies after a judgment of non-suit. *Ibid.*

3. No notice of motion need be given at time of judgment where ground is other than that a verdict is contrary to the law and the evidence. *Ibid.*

4. A motion for new trial does not suspend a judgment or operate as an extension of time to present bill of exceptions to rulings during the trial. *Harrison v. Magoon*, 332.

5. The giving of sufficient bond not to remove property is jurisdictional condition. *Fereira v. Rapid Transit Co.*, 406.

6. \$25 bond not to remove property when verdict is for \$3,000 is insufficient, and exceptions to overruling of motion for new trial will not be considered by Supreme Court. *Fereira v. Rapid Transit Co.*, 797.

MURDER.

Evidence of intent. *Lo Toon v. Territory of Hawaii*, 351.

NAMES.

Winfred H. Babbitt and Winnifred H. Babbitt are *idem sonans*. *Territory of Hawaii v. Johnson*, 743.

NEGLIGENCE.

See **STREET RAILWAYS.**

NEGOTIABLE INSTRUMENTS.

1. An unstamped note may become admissible in evidence by being stamped afterwards. *Yee Chin v. Atoy*, 17.
2. When a note given in payment is not paid at maturity, a recovery may be had on the original contract. *Ibid.*
3. A complaint in a suit upon a note may be amended so as to declare upon the original contract in consideration of which the note was given. *Ibid.*
4. It is unnecessary in a suit upon a note signed by one partner in the firm name to allege the firm to be a mercantile partnership or that the partner was authorized to sign the note; an allegation that defendants made and delivered the note is sufficient. *Yee Chin v. Chu Soi*, 21.
5. Deposit of an accepted draft on Davies & Co., Ltd., held a substantial compliance with terms of advertisement calling for tenders, requiring deposit of a certified check. *Lord v. Supt. Public Works*, 437.
6. An action at law may be maintained on a note accidentally burned up, and no bond of indemnity need be given. *Brown v. Braymer*, 548.
7. Default on filing insufficient answer. *Byrne v. Orpheum Co., Ltd.*, 786.

NOTICE.

1. Knowledge that an offer has been accepted is equivalent to notice. Generally in the case of unilateral contracts the performance of the act specified in the offer as the consideration is a sufficient acceptance, and notice of acceptance is unnecessary. *Clark & Henry v. Hackfeld & Co.*, 53.
2. No notice of motion for a new trial need be given at time of judgment of nonsuit. *Harrison v. Magoon*, 170.
3. Notice must be given person of hearing on question of insanity or adjudication will be void so far as property is concerned. *Haw. T. & Invest. Co. v. Barton*, 294.
4. Notice need not be given of defense of novation. *Marconi's Telegraph Co. v. Cross*, 390.

NOVATION.

See CONTRACTS., 10, 13.

PARTIES.

1. Where there has been a severance of interests of defendants all need not be made parties to a writ of error. *Castle v. Kapiolani Estate, Ltd.*, 33.
2. A taxpayer may bring a suit to restrain the awarding of a public contract in violation of law, though he show no actual damage to himself. *Lucas v. Amer.-Haw. Eng. & Const. Co.*, 80.

PARTIES.—Continued.

3. Separate jury trial not wrongly refused. *Ter. of Hawaii v. Watanabe*, 205; *Ter. of Hawaii v. Johnson*, 743.
4. After death of guardian *ad litem* of an infant plaintiff an amendment is proper substituting the name of the guardian. *Kalamakee v. Wharton*, 228.
5. A purchaser at a receiver's sale need not be made a party to a writ of error by an intervenor who claimed some property sold. *Bierce v. McChesney*, 258.
6. A conveyance of land by plaintiff in an ejectment suit defeats his right to recover. *Andrews v. Wahinenui*, 260; *Andrews v. Kaikena*, 784.
7. A wife may sue in her own name for breach by a street car company of contract made by her husband in paying her fare. *Rhodes v. Rapid Transit Co.*, 319.
8. Where several are named in a contract as joint obligors but are not all obligors, as some names are signed by an unauthorized attorney, they need not all be joined as parties. *Harrison v. Magoon*, 332.
9. The Territory of Hawaii may bring a suit to enjoin the erection of a residence below high water mark. *Territory of Hawaii v. Kerr*, 363.
10. Assignee of mortgage as security may bring foreclosure suit in his own name. *Hackfeld & Co. v. Achi*, 489.
11. A taxpayer may bring suit to enjoin expenditure of public money under unconstitutional statute. *Castle v. Secretary of Territory*, 769.

PARTITION.

1. The Statute of Frauds of Hawaii does not prevent a parol partition of land. *Haw. T. & Invest. Co. v. Barton*, 294.
2. A guardian may be enjoined from proceeding with a partition suit pending hearing on a petition for his removal by a Circuit Judge sitting at chambers in probate. *Carter v. Gear, Second Judge*, 412.

PARTNERSHIP.

1. Evidence held insufficient to show ratification of new partnership agreement. *Harrison v. Magoon*, 332.
2. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any one of them unless all execute or ratify the contract. *Ibid.*
3. Evidence held to show a partnership in two leaseholds. *Barnes v. Collins*, 340.

PLEADING AND PRACTICE.

See VARIANCE, INSTRUCTIONS.

1. When the defendant wishes a physical examination of plaintiff it should be applied for before trial. *Fowler v. H. R. T. & L. Co.*, 1.
2. A promise need not be alleged in a declaration in general assumpsit for goods sold and delivered when the facts are alleged from which a promise may be implied. *Yee Chin v. Atoy*, 17.
3. Useless or fictitious forms of action are not required in Hawaiian practice. *Ibid.*
4. The authority of a partner to sign a note for the partnership is a matter of proof; it need not be pleaded that the partnership is a mercantile one or that the partner is otherwise authorized. *Yee Chin v. Chu Soi*, 21.
5. Where a formal demurrer is filed in district court motion to dismiss in circuit court on appeal may be considered as a demurrer. *Wilcox v. Berrey*, 37.
6. A bill in equity should not be dismissed on appeal because its title and address describe the court as the circuit judge without the words "at chambers." *Kendall v. Holloway*, 45.
7. Adverse possession since date of judgment in ejectment may be pleaded in proceeding for a writ of *scire facias*. *Punilama v. Mele*, 48.
8. An appeal does not lie from a judgment by default. *Kalani-anaole v. Dimond & Co.*, 153.
9. Continuance for lack of witness properly denied when there had been time to obtain witness. *Ter. of Hawaii v. Watanabe*, 196.
10. Grounds of a motion must be stated in the motion. *Ibid.*
11. A plea of general denial in a suit by a corporation admits the competency of the plaintiff to sue as such. *Gonsalves & Co., Ltd., v. Watson*, 256.
12. Competency of an interpreter is a question of fact, not of law. *Lo Toon v. Territory of Hawaii*, 351.
13. Notice need not be given of defense of novation. *Marconi's Tel. Co. v. Cross*, 390.
14. It is unnecessary in a complaint to allege ownership of a judgment sued on. *Young Hin v. Hackfeld & Co.*, 429.
15. In a garnishee suit before a district magistrate there need not be a written petition for process if there is a written recital of such a petition in the summons. *Ibid.*
16. A judge who has tried a case is not disqualified from sitting on motion for change of venue. *Spreckels v. De Bolt, First Judge*, 476.
17. A court may limit time within which defendant in equity must appear and may strike from files demurrer filed long after

PLEADING AND PRACTICE.—Continued.

that time even though no order has been made that bill be taken *pro confesso*. *Hackfeld & Co. v. Achi*, 489.

18. Order of proof rests in discretion of trial judge and is not subject to review except in case of abuse. *Brown v. Braymer*, 548.

19. Defendant in ejectment does not have right to open and close case because she admits plaintiff's paper title and has burden of proof. *Trustees Bishop Estate v. Lulia*, 630.

20. Declaration construed to be in assumpsit on *quantum meruit*. *Johnson v. Lee Toma Co.*, 693.

21. A complaint by a corporation need not allege whether it is domestic or foreign. *Am.-Haw. Eng. & Cons. Co. v. Ter. of Hawaii*, 711.

22. Not correct practice in equity to dismiss a bill on close of plaintiff's case before defendant has rested his case. *Territory of Hawaii v. McCandless*, 728.

23. A defendant has no right to a directed verdict before he rests his case. *Wong Hoon Kan v. Lui Yan*, 734.

24. A continuance to a term beginning in a week is not a denial of a speedy trial. *Territory of Hawaii v. Johnson*, 743.

25. An indefinite continuance until defendant gets well is improper. *Correa v. Baldwin*, 782.

26. An indefinite continuance by a district magistrate is equivalent to a final judgment. *Ibid.*

27. Demurrer lies to petition for removal of executrix. *In re Estate Carter*, 784.

28. Default. *Byrne v. Orpheum Co., Ltd.*, 786.

29. Where both plaintiff and defendant misapprehend an order that calendar be called at 9 a. m. on opening day of term and an appeal from a district magistrate is dismissed, no appearance being made by either party, the order of dismissal is improper. *Washington Mercantile Co., Ltd., v. Hall*, 787.

30. A judgment in a jury waived case signed by the judge as well as clerk which sets out findings is a "decision rendered in writing." *Kapepee v. Kupahi*, 799.

31. Supreme Court will not undertake to decide questions of fact on a motion by one not a party to the case. *Chang Kim v. Lai Young*, 800.

POLICE POWER.

A regulation that no hack driver shall receive a license who does not understand English is invalid. *Sakata v. High Sheriff*, 18.

PROHIBITION.

1. A preliminary order of prohibition expires when a court makes a final order disallowing a permanent writ, and is not re-

PROHIBITION.—Continued.

vived by a supersedeas allowed upon suing out a writ of error. *Carter v. Gear, Second Judge*, 289.

2. The question of power of a probate judge to issue the order complained of is the only one the Supreme Court can inquire into on Prohibition. *Carter v. Gear, Second Judge*, 412.

3. A writ of prohibition cannot be made to take the place of a writ of error. *Colburn v. Cornwell*, 784.

PUBLIC OFFICERS.

See TAXES, PARTIES, CONTRACTS, TREASURER, STENOGRAPHER.

1. Chief clerk of department of public officer and clerk of the market is a Territorial employee within class referred to in embezzlement statute § 158 P. L. *Territory of Hawaii v. Wright*, 128.

2. A clerk of the water works is an officer within meaning of embezzlement statute, Laws of 1903, Act 60. *Territory of Hawaii v. Richardson*, 358.

3. An injunction to restrain illegal expenditure of money must be directed not against Secretary of the Territory but against the treasurer or auditor. *Castle v. Secretary of the Territory*, 769.

4. A county act is not inconsistent with Organic Act because it is inconsistent with such duties of Territorial officers as properly are included in duties of county officers. *Ibid.*

5. To place with county attorneys enforcement of Territorial penal laws to exclusion of attorney general would be contrary to Organic Act. *Ibid.*

RAILWAYS.

See STREET RAILWAY.

Entitled by statute to free government water for maintenance and operation. *Howland v. Oahu Ry. & Land Co.*, 634.

RECORD.

1. In suit before a district magistrate upon a judgment rendered by himself, it is not necessary that his record show affirmatively any evidence of such judgment or that he took judicial notice of it. *Young Hin v. Hackfeld & Co.*, 429.

2. Failure to record an assignment of a lease from husband to wife for two years eight months and until issuance of execution against the husband does not invalidate the assignment as against subsequent creditors. *First Nat. Bank v. Gaines*, 731.

RECOUPMENT.

Where two transactions are entirely distinct and separate from each other, although provided for in the same instrument a claim in one can not be recouped in an action on the other. *Oahu Railway Co. v. Waialua Agricultural Co.*, 520.

REFORMATION.

Of mortgage refused. *Desky v. Booth*, 506.

REHEARING.

1. Denied. *Palolo Land & Improvement Co. v. Wong Quai*, 52; *In re Notley*, 66; *Harrison v. Magoon*, 485; *Godfrey v. Rowland*, 502.
2. Denied when the court had overlooked matters called to its attention, and partly based its decision on a point not raised by counsel. *Young Hin v. Hackfeld & Co.*, 789.
3. Granted. *Silveira v. Ahlo*, 466.

REPLEVIN.

See **SALE**.

The fact that the only demand for return of property was made two years before action does not affect plaintiff's right to recover it. *Kona-Kau Telephone and Telegraph Co. v. Mills*, 783.

SALE.

1. After bringing a suit to enforce a lien which assumes that property is in defendant, plaintiff is estopped from bringing a suit in replevin on theory of conditional sale. *Bierce v. Hutchins*, 418, 717.
2. The furnishing by a social club of liquor to its members and guests who pay the club therefor constitutes a sale within meaning of statute forbidding sales of liquor without license. *Territory of Hawaii v. Pacific Club*, 507.
3. A plaintiff cannot treat a sale as absolute as to part of property covered and conditional as to remainder. *Bierce v. Hutchins*, 717.

SCIRE FACIAS.

The statute of limitations may be pleaded to an action of *scire facias* to revive a judgment in ejectment of 1868 and in such case the Supreme Court has no jurisdiction. *Punilama v. Mele*, 48.

SENTENCE.

That the record does not show that defendants have been sentenced is not ground for discharge upon motion in Supreme Court. *Territory v. Nobriga*, 29.

SET OFF.

An unliquidated claim can not be set off. *Oahu Railway Co. v. Waialua Agricultural Co.*, 520.

STATUTES.

See **CONSTITUTIONAL LAW**.

1. An admission by defendant that it is a corporation authorized to carry out provisions of a franchise conveyed by an act dispenses with proof of the Act. *Fuller v. H. R. T. & L. Co.*, 1.

STATUTES.—Continued.

2. Courts will take judicial notice of an Act authorizing a street railway. *Ibid.*
3. A proviso in a statute need not apply only to the paragraph or clause immediately preceding it. *Cooper v. Island Realty Co.*, 92.
4. In construing a doubtful provision of an Act, other provisions, the reason and spirit of the Act as a whole, the circumstances under which it was adopted and the history which preceded it may be considered and weight given to long continued, unquestioned construction. *Carter v. 2d Judge 1st Circuit*, 242.
5. When a right or privilege granted by statute is repealed, any penalty for violation of such right falls also without express words of repeal. *In re Fukunaga*, 306.
6. A statute may be repealed without being definitely specified. *Castle v. Secretary of the Territory*, 769.

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- 31 " 142, § 1, 5-54, 57-62, 64, 68, 71-84, 86, 91, 99, *Carter v. 2d Judge 1st Circuit*, 243, 245, 253.
- 31 " 142, § 6, *Assessor v. Com. Cable Co.* 400-1; *High Sheriff v. Goto*, 266.
- 31 " 142, § 55, *High Sheriff v. Goto*, 266; *Territory of Hawaii v. Pacific Club*, 509.
- 31 " 142, § 56, *Castle v. Secretary of the Territory*, 773.
- 31 " 142, § 67, *High Sheriff v. Goto*, 266.
- 31 " 142, § 81, *High Sheriff v. Goto*, 266; *Territory of Hawaii v. Boyd*, 667; *Territory v. Johnson*, 747.
- 31 " 142, § 83, *High Sheriff v. Goto*, 266; *Territory v. Johnson*, 747.
- 31 " 142, § 84, *Spreckels v. De Bolt*, First Judge, 476.
- 31 " 142, § 91, *Territory of Hawaii v. Kerr*, 376.
- 31 " 142, § 95, *In re Fukunaga*, 307.
- Laws of 1842, p. 170, *Carter v. 2d Judge 1st Circuit*, 247.
- " 1847, § 842, p. 170, *Carter v. 2nd Judge 1st Circuit*, 249.
- " 1859, Civil Code, § 769, *Godfrey v. Rowland*, 503.
- " " § 814-1282, *Carter v. 2d Judge 1st Cir.*, 249.
- " " § 855-880, 883, *High Sheriff v. Goto*, 264.
- " " § 1155 and 1156, *Harrison v. Magoon*, 175.
- " " § 1284, 1288, 1289, *Godfrey v. Rowland*, 503.

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 " " " " §1286, *Iona v. Uu*, 433.
 " " " " § 820, *Spreckels v. De Bolt*, 1st Judge, 479.
 " " " " §1299, *Notley v. Brown*, 576.
- Laws of 1870, Ch. 32, § 32, *High Sheriff v. Goto*, 264.
 " 1886, Ch. 67, *Bishop of Zeugma v. Paahao*, 350.
 " 1892, Ch. 57, § 57, *Territory of Hawaii v. Boyd*, 666.
 " " " " § 68, *Kalaniana'ole v. Dimond & Co.*, 153.
 " " " " § 37 and 38, *Carter v. 2d Judge 1st Circuit*, 243.
 " 1893, Laws of Prov. Govt., Act 75, *High Sheriff v. Goto*, 264.
 " 1896, Act 64, § 99 and 102, *Sakata v. High Sheriff*, 182.
 " 1898, Ch. 69, § 9, *Rhodes v. Rapid Transit Co.*, 319.
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 " " " " § 11, *Fuller v. H. R. T. & L. Co.*, 3.
 " " " " § 29, *Territory of Hawaii v. Wright*, 131.
 " " " " § 30, *Territory of Hawaii v. Wright*, 138.
 " 1901, Act 19, *Territory of Hawaii v. Boyd*, 666.
 " 1903, Act 10, *Territory of Hawaii v. Richardson*, 358.
 " " " 16, *Carter v. 2nd Judge 1st Circuit*, 243.
 " " " 32, pp. 203-4, *Byrne v. Orpheum Co., Ltd.*, 787.
 " " " 32, § 18, *Kapiolani Estate v. Thurston*, 148.
 " " " 32, § 11 and 12, *Carter v. 2d Judge 1st Cir.*, 243-415.
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 " " " 32, § 11, *Kendall v. Holloway*, 46.
 " " " 32, § 18, *Harrison v. Magoon*, 171, 334.
 " " " 32, § 20, *Scott v. Henriques*, 784.
 " " " 60, *Territory of Hawaii v. Richardson*, 358.
 " " " 75, *Inter-Island Tel. Co. v. Liliuokalani*, 606.
 " " " 78, *Mullen v. Walker*, 66.
 " " " 78, *Kapiolani Estate v. Thurston*, 148.
 " " " 79, *High Sheriff v. Goto*, 265.
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 " " " 18, § 10, *Am.-Haw. Eng. & Const. Co. v. Territory of Hawaii*, 715.
 " 1905, Act 39, Act 54, Act 93, *Castle v. Secretary of the Territory*, 769.
- Civil Laws, § 6, *Assessor v. Com. Cable Co.*, 397.
 " " Ch. 126, *Carter v. Second Judge 1st Circuit*, 243.
 " " § 515, *Ter. of Hawaii v. Richardson*, 362.
 " " " 646, *Haw. T. & Invest. Co. v. Barton*, 301.
 " " " 820, *In re taxes Haw. Sugar Co.*, 237; *In re taxes Wichman & Co.*, 793.
 " " " 817, *Assessor v. Commercial Cable Co.*, 400.

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 " " " 1356-9, Territory of Hawaii v. Watanabe, 207.
 " " " 1443-5, Castle v. Kapiolani Estate, Ltd., 34.
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- Rule 21, Circuit Court, 1893 § C., Hackfeld & Co. v. Achi, 499.
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 " " " 1281, In re Taxes, Hackfeld & Co., Ltd., 564.
 " " " 1281, In re Taxes, Wilder's S. S. Co., 570.
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- Const. of 1894 Art. 82, 83, 89, Carter v. 2d Judge 1st Circuit, 245.
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 " 1894 " 88, Spreckels v. De Bolt, First Judge, 479.
 " 1894 " 88, Galt v. Waiianuhea, 656.

STATUTE OF FRAUDS.

Memorandum held sufficient to show parol partition of land.
Haw. T. & Invest. Co. v. Barton, 294.

STATUTE OF LIMITATIONS.

See ADVERSE POSSESSION.

May be pleaded to an action of scire facias. *Punilama v. Mele*, 48.

STENOGRAPHER.

A circuit court stenographer should furnish free of charge to the attorney general a carbon copy of the transcript of evidence upon direction of the trial court. *In re Andrews*, 483.

STREET RAILWAYS.

1. A defendant's admission that it is a corporation authorized to carry out the provisions of a franchise for a street railway conveyed by a certain act, dispenses with proof of the act. *Fuller v. H. R. T. & L. Co.*, 1.
2. A provision in franchise of street railway granting it right of way does not relieve it of duty of exercising due care to avoid injury to others on street crossings. *Ibid.*
3. A passenger injured in a collision is not guilty of contributory negligence in getting upon side stepping board of car and walking forward upon it, the car being full. *Ibid.*
4. Evidence held to justify finding of negligence of motorman on electric railway. *Ibid.*
5. Negligence of motorman and of driver of wagon. *Dong Chong v. Rapid Transit & Land Co.*, 272.
6. Where two lines of cars pass along same street they are connecting lines throughout that length of street and a passenger is entitled to a transfer from one to the other at any point by Act 69 Sec. 9 Laws of 1898. *Rhodes v. H. R. T. & L. Co.*, 319.
7. A return trip is one that retraces a portion of the same route taken in going. *Ibid.*
8. Under franchise of H. R. T. & L. Co. the right is given a passenger to go in an unbroken journey between any two points within given limits over any connecting line in choice of passenger. *Ibid.*
9. A conductor has a right to eject a passenger who neither shows a transfer nor pays fare, even though as against the street car company the passenger has a right to transportation. *Ibid.*
10. Elements of damage for refusal to give transfer. *Ibid.*

STREET RAILWAYS.—Continued.

11. After accepting fare and giving seat in a trailer to a passenger a street car company may not force the passenger to change to a motor car without furnishing a seat in the second car. *Ashford v. Rapid Transit Co.*, 580.
12. Held liable for killing of boy on horseback despite negligence of deceased. *Ferreira v. H. R. T. & L. Co.*, 615.

SUMMONS.

1. The copy of a summons served on the defendant may be amended by adding the seal of the court if the copy already bears the clerk's signature. *Mullen v. Walker*, 65.
2. A return of service on Young Hin et als. therein named as defendants by handing each of them a true copy thereof, sufficiently shows service on each of twenty-two defendants. *Young Hin v. Hackfeld & Co.*, 427.
3. A return of service on H. S. Comp, Ltd., therein named as garnishee by leaving with him a true copy, sufficiently shows service on Honokaa Sugar Company, Limited, a corporation. *Ibid.*
4. A garnishee summons which recites a petition for process conforms to a statute requiring a written petition for process. *Ibid.*
5. A return of service of summons on Kwong Yick Co. and Young Hin Gang No. 5 therein named as defendant by handing him a copy, does not show proper service on defendants known as Young Hin Gang No. 5. *Young Hin v. Von-Hamm Young Co., Ltd.*, 790.
6. Where a written complaint is made part of a district court summons by reference a return of service is proper which does not refer to the complaint. *Davis v. King*, 792.

SUPERINTENDENT OF PUBLIC WORKS.

1. Specifications for a contract for construction of a wharf which reserve to the Superintendent of Public Works the right to determine what old piles may be used in the work, render intelligent bidding impossible and render any contract for the work void, under Sec. 10. Act 18 Laws of 1903 Ex. Sess. which provides for public advertisement for tenders. *Lucas v. Amer.-Haw. Eng. & Const. Co.*, 80.
2. In calling for bids for public work the superintendent of public works may require that certified checks be deposited with bids, and after doing so may not waive the condition but may accept a substantial compliance with it as an accepted draft on a well known business house. *Lord v. Supt. Public Works*, 437.

SUPREME COURT.

See EXCEPTIONS, COURTS. .

TAXES.

1. An assessor holds a bond given him by his deputy under Sec. 842 Civ. Laws as trustee for the Territory and cannot release a surety on such a bond.
2. Taxes are an incumbrance against real estate from the 1st day of January in each year. *Cooper v. Island Realty Co.*, 92.
3. A mortgagor must make a return of the mortgage and amount secured thereby to obtain the right under Sec. 831 Civ. Laws to charge taxes against mortgage. *Ibid.*
4. Assessment of lessor's interest in plantation land. *In re Taxes, Haw. Sugar Co.*, 236.
5. The Territory has power to tax property at sea within three miles of low water mark. *Assessor v. Com. Cable Co.*, 396.
6. A cable lying under water is personal property. *Ibid.* . . .
7. Invoice price plus duties paid less 5 per cent a year for depreciation is taxable value of cable. *Ibid.*
8. Loss due to payment of too high price for poor property not properly deducted from income in the year the loss is discovered. *In re Taxes, Pacific Guano & Fertilizer Co.*, 552.
9. Assessment of sugar plantation. *In re taxes, Ewa Plantation Co.*, 555.
10. A loss written off the books of the taxpayer but not actually sustained during the year is not to be deducted from income in assessing income tax. *In re taxes, Hackfeld & Co., Ltd.*, 559.
11. Where lessee subleased to a plantation company rent to consist of proportion of profits from the plantation the lessee's interest is properly assessed, although the plantation pays taxes on its business as an enterprise for profit. *In re taxes, Oahu Ry. & Land Co.*, 564.
12. Cost of replacing a steamer which became unserviceable under requirements of Federal inspectors not a loss to be deducted from income. *In re taxes, Wilder's S. S. Co.*, 567.
13. Plantation agency contracts have cash values which can be appraised and are taxable. *In re taxes, Agency contracts*, 584.
14. Double taxation may not violate guaranty of due process of law. *Ibid.*
15. Counties may properly share in Territorial tax money assessed and collected by Territorial officers. *Castle v. Secretary of the Territory*, 769.
16. Unimproved city lot. *In re taxes, Perry*, 792.
17. Assessment of enterprise for profit—jewelry store. *In re Wichman & Co., Ltd.*, 793.
18. Deduction of cost of instruments, books, etc., may not be made from income of surveyor in estimating income tax. *In re Smith*, 796.

TAXES.—Continued.

19. Amount allowed by employer for expenses is part of salary of employee. *In re Hayes*, 796.
20. Assessment of corporation based on value of its stock and bonds. *In re Hon. Rapid Transit & L. Co.*, 802.

TENANTS IN COMMON.

When a co-tenant sells land his fellow co-tenants if the vendee enters into possession, are put upon inquiry as to whether the deed purports to convey the entire tract or only the share of the vendor. *Kalamakee v. Wharton*, 228.

TREASURER.

The treasurer has no authority to make a regulation that no hack driver who does not speak English shall receive a license. *Sakata v. High Sheriff*, 181.

TRUSTS.

1. A trustee holding corporation shares of stock with right to purchase stock of a new issue at par is liable for the value of such right though he released same without charge at advice of an attorney. *In re Cummins*, 185.
2. Such right to purchase new shares is not income but principal. *Ibid.*
3. The statute of uses has been in force in Hawaii since 1855. *Haw. T. & Invest. Co. v. Barton*, 294; *Godfrey v. Rowland*, 377.

VARIANCE.

1. When in a suit to enforce a materialman's lien a contract with the owner is alleged, but one with a contractor proved, the variance justifies a directed verdict for defendant. *Allen & Robinson v. Reist*, 23.
2. No fatal variance between Winnifred H. Babbitt and Winifred H. Babbitt as names are idem sonans. *Territory of Hawaii v. Johnson*, 743.

VERDICT.

1. A verdict for interest is not invalid for uncertainty in an action for a sum certain with due dates fixed by a written instrument. *Pratt v. Ahin*, 150.
2. A verdict in an ejectment suit in favor of plaintiff for damages, construed to include a verdict for land. *How On v. Ah Ho*, 669.
3. A verdict in a criminal case will not be set aside because of evidence on which if believed a doubt of guilt might be based. *Territory of Hawaii v. Johnson*, 743.

WATER.

1. Damage caused taro crop by illegal diversion of water. *Lum Ah Lee v. Ah Soong*, 163.
2. A land owner whose land extends to high water mark has no right to erect a residence partly below high water mark and such structure may be enjoined by Territory of Hawaii. *Territory of Hawaii v. Kerr*, 363.
3. Oahu Railway & Land Co. entitled by statute to free use of water for maintenance and operation of its railroad. *Superintendent Honolulu Waterworks v. O. R. & L. Co.*, 634.

WILLS.

"Property" construed to include real property in a direction that trustees publish annually an inventory of all property of the estate. *In re Trustees under will of Bernice P. Bishop*, 804.

WRIT OF ERROR.

1. The amount of counsel fees allowed attorney of ward in a probate case is not reviewable by writ of error. *Magoon v. Fitch*, 13.
2. A writ of error lies to correct a judgment in a jury waived case as several instead of a single judgment. *Castle v. Kapiolani Estate, Ltd.*, 33.
3. Where there has been a severance of interests of defendants all need not be made parties to a writ of error. *Ibid.*
4. A writ of error lies to an order of sale by a receiver and does not require that the purchaser be made a party. *Bierce v. McChesney*, 258.
5. A supersedeas allowed upon suing out a writ of error does not revive a temporary order of prohibition. *Carter v. Gear, Second Judge*, 289.
6. There must be an election whether to review judgment by bill of exceptions or by writ of error, both remedies may not be used at same time. *Ferreira v. H. R. T. & L. Co.*, 406, 797.
7. A defendant in a garnishee suit cannot assign as error that the trial court had no jurisdiction over the person of the garnishee. *Young Hin v. Hackfeld & Co.*, 427.

- E. J. C. A.
2/7/08.

